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Report of the Human Rights Committee

Volume II

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Fifty-sixth Session
Supplement No. 40 (A/56/40)

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Volume II

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Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The present document contains annexes X and XI of the report of the Human Rights Committee. Chapters I to VI and annexes I to IX are contained in volume I.

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Annex X

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 547/1993, Mahuika et al. v. New Zealand (Views adopted on 27 October 2000, seventieth session)*

Submitted by:	Apirana Mahuika et al. (represented by Maori Legal Service)
Alleged victims:	The authors
State party:	New Zealand
Date of communication:	10 December 1992 (initial submission)
Prior decisions:	- Special Rapporteur's rule 91 decision, transmitted to the State party on 14 June 1993 (not issued in document form) - CCPR/C/55/D/547/1993, decision on admissibility, 13 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 October 2000,

Having concluded its consideration of communication No. 574/1993 submitted to the Human Rights Committee by Apirana Mahuika et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The text of an individual opinion signed by one Committee member is appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Apirana Mahuika and 18 other individuals, belonging to the Maori people of New Zealand. They claim to be victims of violations by New Zealand of articles 1, 2, 16, 18, 26 and 27 of the International Covenant on Civil and Political Rights. They are represented by counsel. The Covenant entered into force for New Zealand on 28 March 1979, and the Optional Protocol on 26 August 1989.

2. At its fifty-fifth session, the Human Rights Committee considered the admissibility of the communication and found that the requirements under article 5, paragraph 2, of the Optional Protocol did not preclude it from considering the communication. However, the Committee declared inadmissible the authors' claims under articles 16, 18 and 26 for failure to substantiate, for purposes of admissibility, that their rights under these articles were violated.

3. When declaring the authors' remaining claims admissible insofar as they might raise issues under articles 14 (1) and 27 in conjunction with article 1, the Committee noted that only the consideration of the merits of the case would enable the Committee to determine the relevance of article 1 to the authors' claims under article 27.

4. In their submission on admissibility, both parties commented extensively on the merits of the claims before the Committee. After the communication was declared admissible, the State party presented additional observations, to which the authors did not comment.

The factual background

5.1 The Maori people of New Zealand number approximately 500,000, 70 per cent of whom are affiliated to one or more of 81 iwi.[1] The authors belong to seven distinct iwi (including two of the largest and in total comprising more than 140,000 Maori) and claim to represent these. In 1840, Maori and the predecessor of the New Zealand Government, the British Crown, signed the Treaty of Waitangi, which affirmed the rights of Maori, including their right to self-determination and the right to control tribal fisheries. In the second article of the Treaty, the Crown guarantees to Maori:

> "The full exclusive and undisturbed possession of their lands, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession..."[2]

The Treaty of Waitangi is not enforceable in New Zealand law except insofar as it is given force of law in whole or in part by Parliament in legislation. However, it imposes obligations on the Crown and claims under the Treaty can be investigated by the Waitangi Tribunal.[3]

5.2 No attempt was made to determine the extent of the fisheries until the introduction of the Quota Management System in the 1980s. That system, which constitutes the primary mechanism for the conservation of New Zealand's fisheries resources and for the regulation of commercial fishing in New Zealand, allocates permanent, transferable, property rights in quota for each commercial species within the system.

5.3 The New Zealand fishing industry had seen a dramatic growth in the early 1960s with the expansion of an exclusive fisheries zone of nine, and later twelve miles. At that time, all New Zealanders, including Maori, could apply for and be granted a commercial fishing permit; the majority of commercial fishers were not Maori, and of those who were, the majority were part-time fishers. By the early 1980s, inshore fisheries were over-exploited and the Government placed a moratorium on the issue of new permits and removed part-time fishers from the industry. This measure had the unintended effect of removing many of the Maori fishers from the commercial industry. Since the efforts to manage the commercial fishery fell short of what was needed, in 1986 the Government amended the existing Fisheries Act and introduced a quota management system for the commercial use and exploitation of the country's fisheries. Section 88 (2) of the Fisheries Act provides "that nothing in this Act shall affect any Maori fishing rights". In 1987, the Maori tribes filed an application with the High Court of New Zealand, claiming that the implementation of the quota system would affect their tribal Treaty rights contrary to section 88 (2) of the Fisheries Act, and obtained interim injunctions against the Government.

5.4 In 1988, the Government started negotiations with Maori, who were represented by four representatives. The Maori representatives were given a mandate to negotiate to obtain 50 per cent of all New Zealand commercial fisheries. In 1989, after negotiation and as an interim measure, Maori agreed to the introduction of the Maori Fisheries Act 1989, which provided for the immediate transfer of 10 per cent of all quota to a Maori Fisheries Commission which would administer the resource on behalf of the tribes. This allowed the introduction of the quota system to go ahead as scheduled. Under the Act, Maori can also apply to manage the fishery in areas which had customarily been of special significance to a tribe or sub-tribe, either as a source of food or for spiritual reasons.

5.5 Although the Maori Fisheries Act 1989 was understood as an interim measure only, there were limited opportunities to purchase any more significant quantities of quota on the market. In February 1992, Maori became aware that Sealords, the largest fishing company in Australia and New Zealand was likely to be publicly floated at some time during that year. The Maori Fisheries Negotiators and the Maori Fisheries Commission approached the Government with a proposition that the Government provide funding for the purchase of Sealords as part of a settlement of Treaty claims to Fisheries. Initially the Government refused, but following the Waitangi Tribunal report of August 1992 on the Ngai Tahu Sea Fishing, in which the Tribunal found that Ngai Tahu, the largest tribe from the South Island of New Zealand, had a development right to a reasonable share of deep water fisheries, the Government decided to enter into negotiations. These negotiations led on 27 August 1992 to the signing of a Memorandum of Understanding between the Government and the Maori negotiators.

5.6 Pursuant to this Memorandum, the Government would provide Maori with funds required to purchase 50 per cent of the major New Zealand fishing company, Sealords, which owned 26 per cent of the then available quota. In return, Maori would withdraw all pending litigation and support the repeal of section 88 (2) of the Fisheries Act as well as an amendment to the Treaty of Waitangi Act 1975, to exclude from the Waitangi Tribunal's jurisdiction claims relating to commercial fishing. The Crown also agreed to allocate 20 per cent of quota issued for new species brought within the Quota Management System to the Maori Fisheries Commission, and to ensure that Maori would be able to participate in "any relevant statutory fishing management and enhancement policy bodies." In addition, in relation to non-commercial fisheries, the Crown agreed to empower the making of regulations, after consultation with Maori, recognizing and providing for customary food gathering and the special relationship between Maori and places of customary food gathering importance.

5.7 The Maori negotiators sought a mandate from Maori for the deal outlined in the memorandum of understanding. The memorandum and its implications were debated at a national hui[4] and at hui at 23 marae[5] throughout the country. The Maori negotiators' report showed that 50 iwi comprising 208,681 Maori, supported the settlement.[6] On the basis of this report, the Government was satisfied that a mandate for a settlement had been given and on 23 September 1992, a Deed of Settlement was executed by the New Zealand Government and Maori representatives. The Deed implements the Memorandum of Understanding and concerns not only sea fisheries but all freshwater and inland fisheries as well. Pursuant to the Deed, the Government pays the Maori tribes a total of NZ$ 150,000,000 to develop their fishing industry and gives the Maori 20 per cent of new quota for species. The Maori fishing rights will no longer be enforceable in court and will be replaced by regulations. Paragraph 5.1 of the Deed reads:

> "Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common law (including customary law and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights or interests have been the subject of recommendation or adjudication by the Courts or the Waitangi Tribunal."

Paragraph 5.2 reads:

> "The Crown and Maori agree that in respect of all fishing rights and interests of Maori other than commercial fishing rights and interests their status changes so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect (as would make them enforceable in civil proceedings or afford defences in criminal, regulatory or other proceedings). Nor will they have legislative recognition. Such rights and interests are not extinguished by this Settlement Deed and the settlement it evidences. They continue to be subject to the principles of the Treaty of Waitangi and where appropriate give rise to Treaty obligations on the Crown. Such matters may also be the subject of requests by Maori to the Government or initiatives by Government in consultation with Maori to develop policies to help recognize use and management practices of Maori in the exercise of their traditional rights."

The Deed recorded that the name of the Maori Fisheries Commission would be changed to the "Treaty of Waitangi Fisheries Commission", and that the Commission would be accountable to Maori as well as to the Crown in order to give Maori better control of their fisheries guaranteed by the Treaty of Waitangi.

5.8 According to the authors the contents of the Memorandum of Understanding were not always adequately disclosed or explained to tribes and sub-tribes. In some cases, therefore, informed decision-making on the proposals contained in the Memorandum of understanding was seriously inhibited. The authors emphasize that while some of the Hui were supportive of the proposed Sealords deal, a significant number of tribes and sub-tribes either opposed the deal completely or were prepared to give it conditional support only. The authors further note that the Maori negotiators have been at pains to make clear that they had no authority and did not purport to represent individual tribes and sub-tribes in relation to any aspect of the Sealords deal, including the conclusion and signing of the Deed of Settlement.

5.9 The Deed was signed by 110 signatories. Among the signatories were the 8 Maori Fisheries Negotiators (the four representatives and their alternates), two of whom represented pan-Maori organizations;[7] 31 plaintiffs in proceedings against the Crown relating to fishing rights, including representatives of 11 iwi; 43 signatories representing 17 iwi; and 28 signatories who signed the Deed later and who represent 9 iwi. The authors observe that one of the difficulties of ascertaining the precise number of tribes who signed the Deed of Settlement relates to verification of authority to sign on behalf of the tribes, and claim that it is apparent that a number of signatories did not possess such authority or that there was doubt as to whether they possessed such authority. The authors note that tribes claiming major commercial fisheries resources, were not among the signatories.

5.10 Following the signing of the Deed of Settlement, the authors and others initiated legal proceedings in the High Court of New Zealand, seeking an interim order to prevent the Government from implementing the Deed by legislation. They argued inter alia that the Government's actions amounted to a breach of the New Zealand Bill of Rights Act 1990.[8] The application was denied on 12 October 1992 and the authors appealed by way of interlocutory application to the Court of Appeal. On 3 November 1992, the Court of Appeal held that it was unable to grant the relief sought on the grounds that the Courts could not interfere in Parliamentary proceedings and that no issue under the Bill of Rights had arisen at that time.

5.11 Claims were then brought to the Waitangi Tribunal, which issued its report on 6 November 1992. The report concluded that the settlement was not contrary to the Treaty except for some aspects which could be rectified in the anticipated legislation. In this respect, the Waitangi Tribunal considered that the proposed extinguishment and/or abrogation of Treaty interests in commercial and non-commercial fisheries was not consistent with the Treaty of Waitangi or with the Government's fiduciary responsibilities. The Tribunal recommended to the Government that the legislation make no provision for the extinguishment of interests in commercial fisheries and that the legislation in fact affirm those interests and acknowledge that they have been satisfied, that fishery regulations and policies be reviewable in the courts against the Treaty's principles, and that the courts be empowered to have regard to the settlement in the event of future claims affecting commercial fish management laws.

5.12 On 3 December 1992, the Treaty of Waitangi (Fisheries Claims) Settlement Bill 1992 was introduced. Because of the time constraints involved in securing the Sealords bid, the Bill was not referred to the competent Select Committee for hearing, but immediately presented and discussed in Parliament. The Bill became law on 14 December 1992. It is recorded in the preamble to the Act that:

> "The implementation of the Deed through legislation and the continuing relationship between the Crown and Maori would constitute a full and final settlement of all Maori claims to commercial fishing rights and would change the status of non-commercial fishing rights so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect but would continue to be subject to the principles of the Treaty of Waitangi and give rise to Treaty obligations on the Crown."

The Act provides inter alia for the payment of NZ$ 150,000,000 to Maori. The Act also states in section 9, that "all claims (current and future) by Maori in respect of commercial fishing ... are hereby finally settled" and accordingly:

> "The obligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interests of Maori in commercial fishing, or the quantification thereof, ..." "All claims (current and future) in respect of, or directly or indirectly based on, rights and interests of Maori in commercial fishing are hereby fully and finally settled, satisfied and discharged."

With respect to the effect of the settlement on non-commercial Maori fishing rights and interests, it is declared that these shall continue to give rise to Treaty obligations on the Crown and that regulations shall be made to recognize and provide for customary food gathering by Maori. The rights or interests of Maori in non-commercial fishing giving rise to such claims shall no longer have legal effect and accordingly are not enforceable in civil proceedings and shall not provide a defence to any criminal, regulatory or other proceeding, except to the extent that such rights or interests are provided for in regulations. According to the Act, the Maori Fisheries Commission was renamed to Treaty of Waitangi Fisheries Commission, and its membership expanded from seven to thirteen members. Its functions were also expanded. In particular, the Commission now has the primary role in safeguarding Maori interests in commercial fisheries.

5.13 The joint venture bid for Sealords was successful. After consultation with Maori, new Commissioners were appointed to the Treaty of Waitangi Fisheries Commission. Since then, the value of the Maori stake in commercial fishing has grown rapidly. In 1996, its net assets had increased to a book value of 374 million dollars. In addition to its 50 per cent stake in Sealords, the Commission now controls also Moana Pacific Fisheries Limited (the biggest in-shore fishing company in New Zealand), Te Waka Huia Limited, Pacific Marine Farms Limited and Chatham Processing Limited. The Commission has disbursed substantial assistance in the form of discounted annual leases of quota, educational scholarships and assistance to Maori input into the development of a customary fishing regime. Customary fishing regulations have been elaborated by the Crown in consultation with Maori.

The complaint

6.1 The authors claim that the Treaty of Waitangi (Fisheries Claims) Settlement Act confiscates their fishing resources, denies them their right to freely determine their political status and interferes with their right to freely pursue their economic, social and cultural development. It is submitted that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 is in breach of the State party's obligations under the Treaty of Waitangi. In this context, the authors claim that the right to self-determination under article 1 of the Covenant is only effective when people have access to and control over their resources.

6.2 The authors claim that the Government's actions are threatening their way of life and the culture of their tribes, in violation of article 27 of the Covenant. They submit that fishing is one of the main elements of their traditional culture, that they have present-day fishing interests and the strong desire to manifest their culture through fishing to the fullest extent of their traditional territories. They further submit that their traditional culture comprises commercial elements and does not distinguish clearly between commercial and other fishing. They claim that the new legislation removes their right to pursue traditional fishing other than in the limited sense preserved by the law and that the commercial aspect of fishing is being denied to them in exchange for a share in fishing quota. In this connection, the authors refer to the Committee's Views in communication No. 167/1984 (Ominayak v. Canada), where it was recognized that "the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong."[9]

6.3 The authors recall that the Quota Management System was found by the Waitangi Tribunal to be in conflict with the Treaty of Waitangi since it gave exclusive possession of property rights in fishing to non-Maori, and that the New Zealand High Court and Court of Appeal had in several decisions between 1987 and 1990 restrained the further implementation of the QMS on the basis that it was "clearly arguable" that the QMS unlawfully breached Maori fishing rights, protected by section 88 (2) of the Fisheries Act 1983. With the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, QMS has been validated for all purposes. They state that by repealing section 88 (2) of the Fisheries Act 1983, Maori fishing rights are no longer protected.

6.4 Some of the authors claim that no Notices of Discontinuance were signed on behalf of their tribes or sub-tribes in respect of fisheries claims that were pending before the courts and that these proceedings were statutorily discontinued without their tribes' or sub-tribes' consent by section 11(2) (g) and (i) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. This is said to constitute a violation of their right under article 14 (1) of the Covenant, to have access to court for the determination of their rights and obligations in a suit at law. In this context, the authors submit that Maori fishing rights are clearly "rights and obligations in a suit at law" within the meaning of article 14 (1) of the Covenant because they are proprietary in nature. Prior to the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Maori filed numerous fishing claims in the courts. The authors submit that article 14 (1) of the Covenant guarantees the authors, and their tribes or sub-tribes, the right to have these disputes determined by a tribunal which complies with all of the requirements of article 14. In this context, it is submitted that although customary and aboriginal rights or interests can still be considered by the Waitangi Tribunal in the light of the principles of the Treaty of Waitangi, the Waitangi Tribunal's powers remain recommendatory only.

6.5 The authors submit that prior to the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, they had a right of access to a court or tribunal based on section 88 of the Fisheries Act to protect, determine the nature and extent, and to enforce their common law and Treaty of Waitangi fishing rights or interests. The repeal of this section by the 1992 Act interferes with and curtails their right to a fair and public hearing of their rights and obligations in a suit at law as guaranteed by article 14 (1) of the Covenant, because there is no longer any statutory framework within which these rights or interests can be litigated.

The State party's observations

7.1 With regard to the authors' claim under article 27, the State party accepts that the enjoyment of Maori culture encompasses the right to engage in fishing activities and it accepts that it has positive obligations to ensure that these rights are recognized. The Fisheries Settlement, it submits, has achieved this. According to the State party, the right to revenue through quota, together with Maori participation in the Sealords deal, is the modern day embodiment of Maori claims to the commercial fishery. The outcome of the Fisheries Settlement is that Maori, who constitute approximately 15 per cent of the population of New Zealand, now have effective control of New Zealand's largest deep water fishing fleet and over 40 per cent of New Zealand's fishing quota. The Settlement is the vehicle that has ensured Maori participation in the commercial fishing industry - on terms set by Maori in a company in which Maori exercise effective control through their shareholding and their representatives on the Board of Directors. According to the State party, the Fisheries Settlement has placed Maori in an unprecedented position to expand their presence in the market through the acquisition of further quota and fishing assets, as well as through diversification in international catching, processing and marketing. This is a route that the Treaty of Waitangi Fisheries Commission and its companies, as well as individual tribes, are increasingly following. The Fisheries Settlement also specifically protects Maori non-commercial fishing rights and statutory regulations have been developed to ensure that provision is made for customary food gathering and that the special relationship between Maori and places of importance for customary food gathering is recognized.

7.2 Further, the State party notes that rights of minorities contained in article 27 are not unlimited. They may be subject to reasonable regulation and other controls or limitations, provided that these measures have a reasonable and objective justification, are consistent with the other provisions of the Covenant and do not amount to a denial of the right. In the case of the Fisheries Settlement the State party had a number of important obligations to reconcile. It was necessary to balance the concerns of individual dissentients against its obligations to Maori as a whole to secure a resolution to fisheries claims and the need to introduce measures to ensure the sustainability of the resource.

7.3 Moreover, the State party emphasizes that it is evident from the Memorandum of Understanding that it was the common understanding of the Government and the Maori Fisheries Negotiators that the settlement was conditional on confirmation of the Negotiators' mandate to act on behalf of all Maori. Subject to this confirmation, the proposal stipulated that the Sealords purchase would result in the settlement of *all* Maori rights and interests in New Zealand's commercial fisheries, that the settlement would include the introduction of legislation to repeal section 88 (2) of the Fisheries Act 1983 and all other legislation conferring legal entitlements to all Maori fisheries rights and interests, the discontinuance of all litigation in pursuit of Maori rights or interests in commercial fishing and Maori endorsement of the Quota Management System. The State party refers to the Court of Appeal's decision in Te Runanga o Wharekauri Rekohu v. Attorney-General, in which it was found that the proposal negotiated between the Government and the Maori Fisheries Negotiators was consistent with the Government's duty under the Treaty of Waitangi and that a failure to take the opportunity presented by the availability of Sealords for purchase would have been inconsistent with that duty. The State party further refers to similar sentiments expressed by the Waitangi Tribunal.

7.4 As regards the authors' statement that the settlement received only limited support from Maori, the State party recalls the process of consultation pursued by the Maori negotiators following the initialling of the memorandum of understanding, on the basis of which the Maori negotiators and subsequently the Crown concluded that there was a sufficient mandate for the negotiation and execution of the Deed of Settlement. The State party refers to the opinion of the Waitangi Tribunal that the report of the Maori negotiators conveyed the impression that there was indeed a mandate for the settlement, provided that the Treaty itself was not compromised, and that in the light of the report it was reasonable for the Crown to believe it was justified in proceeding. The State party also refers to the opinion of the Waitangi Tribunal, "that the settlement should proceed despite the inevitable compromise to the independent rangatiratanga[10] of the dissentients ... On the basis then that the settlement is to introduce new national policy for the benefit of tribes, to perfect rights rather than abrogate them and with protection for the customary position, we consider this settlement can be dealt with not just at an iwi level, but a pan iwi level, where the actual consent of each iwi is not a pre-requisite, and a general consensus can be relied upon". The State party emphasizes that responsibility for satisfying the Government that the proposal had the support of Maori lay with the Negotiators, and that the process of internal decision making within Maori was not a matter of direct concern to the Government which was entitled to rely on the report of the Negotiators. The State party further refers to the Committee's decision in Grand Chief Donald Marshall et al. v. Canada[11] where the Human Rights Committee rejected a claim that all tribal groups should have a right to participate in consultations on aboriginal matters.

7.5 As to the authors' criticism of the Quota Management System, the State party states that the system was introduced out of the need for effective measures to conserve the depleted inshore fishery. In this context, the State party submits that it had a duty to all New Zealanders to conserve and manage the resource for future generations. The State party recalls that the decisions by the Waitangi Tribunal and the Court of Appeal, while criticising the initial implementation, recognized that the purpose and intention of the Quota Management System was not necessarily in conflict with the principles and terms of the Treaty of Waitangi. The State party emphasizes that while the Quota Management System imposed a new regime which changed the nature of the Maori commercial fishing interest, this was based on the reasonable and objective needs of overall sustainable management.

7.6 With regard to the Committee's statement when declaring the communication admissible that only at the determination of the merits of the case will the Committee be able to determine the relevance of article 1 to the authors' claims under article 27, the State party submits that it would be most concerned if the Committee were to depart from the position which has been accepted by States parties to the Covenant and by the Committee itself that the Committee has no jurisdiction to consider claims regarding the rights contained in article 1. Those rights have long been recognized as collective rights. Therefore, they fall outside the Committee's mandate to consider complaints by individuals, and it is not within the ambit of the Optional Protocol procedures for individuals purporting to represent Maori to raise alleged violations of the collective rights contained in article 1. The State party further argues that the rights in article 1 attach to "peoples" of a state in their entirety, not to minorities, whether indigenous or not, within the borders of an independent and democratic state. Moreover, the State party challenges the authors' authority to speak on behalf of the majority of the members of their tribes.

7.7 With respect to the authors' claim that they are victims of a violation of article 14 (1) of the Covenant, the State party submits that the authors' complaint is fundamentally misconceived and amounts to an attempt to import into the article a content which is not consistent with the language of the article and which was not intended at the time the Covenant was drafted. According to the State party, article 14 does not provide a general right of access to courts in the absence of rights and jurisdiction recognized by law. Rather article 14 sets out procedural standards which must be upheld to ensure the proper administration of justice. The requirements of article 14 do not arise in a vacuum. The State party submits that the introductory words of the article make it clear that the guarantee of those procedural standards arises only when criminal or civil proceedings are in prospect; that is, when there is a legal cause of action to be tried in a court of competent jurisdiction. The consequence of the position put forward by the authors would be that a State's legislature could not determine the jurisdiction of its Courts and the Committee would be involved in making substantive decisions on the justifiability of rights in domestic legal systems which extend far beyond the guarantees in the Covenant.

7.8 The State party adds that the authors' complaint seeks to obscure the central element of the 1992 Settlement. In the State party's opinion, the authors' argument that the Settlement extinguished a right to go to court in respect of pre-existing claims ignores the fact that the Settlement in fact settled those claims by transforming them into a guaranteed entitlement to participate in the commercial fisheries. Since those claims had been settled, by definition there could no longer be a right to go to court to seek a further expansion of those rights. The State party explains, however, that while any pre-existing claims can no longer found a cause of action, Maori fisheries issues do remain within the jurisdiction of the courts. Decisions of the Treaty of Waitangi Fisheries Commission regarding the allocation of the benefits of the Settlement are subject to review by the courts in the same manner as decisions of any other statutory body. Likewise the regulations regarding customary fishing rights and decisions taken pursuant to these regulations are reviewable by the courts and the Waitangi Tribunal. Recent litigation before the New Zealand courts, including that before the Court of Appeal regarding the extent to which urban Maori who are unaffiliated with iwi structures have the right to benefit from the Settlement and regarding a proposed allocation of benefit of the Settlement, demonstrate conclusively that access to the courts remains. In addition, Maori who are engaged in fishing activities have exactly the same rights as any other New Zealander to go to court to challenge decisions of the Government which affect those rights or to seek protection of those rights from encroachment by others.

7.9 In conclusion, the State party asserts that the Fisheries Settlement has not breached the rights of the authors, or of any other Maori, under the Covenant. On the contrary, the State party submits that the Settlement should be regarded as one of the most positive achievements in recent years in securing the recognition of Maori rights in conformity with the principles of the Treaty of Waitangi. The State party states that it is committed to resolve and settle Maori grievances in an honourable and equitable manner. It acknowledges that any such settlements, which require a degree of compromise and accommodation on both sides, are unlikely to attract unanimous support from Maori. In this context, it states that the Settlement did not have unanimous support from non-Maori New Zealanders either. Indeed, it was evident from public reaction at the time that a significant proportion of non-Maori New Zealanders were opposed to the Settlement and did not accept that Maori should be accorded distinctive rights to the New Zealand fisheries. However, the State party observes that it cannot allow itself to be paralysed by a lack of unanimity, and it will not use the withholding of agreement by some dissentients, Maori or non-Maori, as an excuse for failing to take positive action to redress Maori grievances in circumstances where such action has the clear support of the majority of interested Maori. The State party therefore submits that the Committee should dismiss the authors' complaints.

Authors' comments on the State party's submission

8.1 The authors argue that article 27 of the Covenant requires the Government of New Zealand to adduce convincing and cogent evidence which establishes the necessity and proportionality of its interferences with the rights and freedoms of the authors, and their tribes or sub-tribes, as guaranteed by article 27. The authors submit that the State party has not advanced any reasons why, nor provided any empirical evidence to substantiate that sis 9, 10, 11, 33, 34, 37 and 40 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 are "reasonable or necessary" to achieve the objectives of ensuring proper management of fisheries, including meeting international obligations for the conservation and management of marine living resources. The authors further submit that "if the Government of New Zealand wishes to arrogate to itself the power to regulate Maori fisheries without the consent of the authors, and their tribes or sub tribes who are recognized as having rangatiratanga and dominion over, and property interests in, those fisheries pursuant to the Treaty of Waitangi, article 27 of the Covenant requires the Government of New Zealand to adduce convincing and cogent evidence which established the necessity and proportionality of its interferences with the rights and freedoms of the authors, and their tribes or sub-tribes, as guaranteed by article 27." The authors submit that the State party has not adduced any such evidence.

8.2 Furthermore, the authors submit that article 27 of the Covenant requires the State party to take positive steps to assist Maori to enjoy their own culture. They argue that, far from fulfilling this aspect of its obligations under article 27 of the Covenant, the State party has, by its enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, seriously interfered with the enjoyment by the authors, and their tribes or sub-tribes, of their rights or freedoms under article 27. The authors also submit that article 27 of the Covenant requires the Government of New Zealand to implement the Treaty of Waitangi. The authors emphasize that fishing is a fundamental aspect of Maori culture and religion. As an articulation of this close relationship they refer to the following passage in the Muriwhenua Fishing Report by the Waitangi Tribunal.[12]

> "To understand the significance of such key Treaty words as 'taonga' and 'tino rangatiratanga' each must be seen within the context of Maori cultural values. In the Maori idiom 'taonga' in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift-exchange, and is a part of the complex relationship between Maori and their ancestral lands and water. The fisheries taonga contains a vision stretching back into the past, and encompasses 1,000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements.
>
> This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources. When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution, the tangata whenua and their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past.
>
> The Maori 'taonga' in terms of fisheries has a depth and a breadth which goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future, which colours their thinking, attitude and behaviour towards their fisheries.
>
> The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or 'belonging', but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a 'hurt' to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana.
>
> The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.

> This vision provided the mauri (life-force) which ensured the continued survival of the iwi Maori. Maori fisheries include, but are not limited to a narrow physical view of fisheries, fish, fishing ground, fishing methods and the sale of those resources, for monetary gain; but they also embrace much deeper dimensions in the Maori mind."

8.3 In this context, the authors refer to the Committee's General Comment on article 27 and submit that article 27 of the Covenant clearly protects Maori enjoyment of their fishing rights. They contest the State party's position that the right of Maori to engage in fisheries activities has been "secured" by the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Maori Fisheries Act 1989. Indeed, they claim that these rights have been effectively extinguished and/or abrogated and that the benefits provided to Maori under the legislation do not constitute lawful satisfaction. It is submitted that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 imposes an artificial division upon their fishing rights or interests in their fisheries without regard to the sacred nature of the relationship which exists between the authors (both personal and tribal) and their fisheries; it effectively curtails the ability of the authors, and their tribes or sub-tribes, to protect their fisheries for future generations; it extinguishes and/or effectively abrogates their common law and Treaty of Waitangi rights or interests; it affects their ability to harvest and manage their fisheries in accordance with their cultural and religious customs and traditions; and it imposes a regime which relocates regulatory power over Maori fisheries in the hands of the Director-General of Fisheries.

8.4 They also argue that the Waitangi Tribunal clearly expressed the view that the acceptability of any "inevitable compromise to the independent rangatiratanga of the dissentients" was predicated upon the modification of the implementing legislation by the Government of New Zealand in accordance with the Waitangi Tribunal's recommendations. The authors further argue that their case is distinguishable from the case of Grand Chief Donald Marshall et al. v. Canada, since that case did not concern the necessity of obtaining a minority group's consent to the extinguishment and/or effective abrogation of its property rights and denial of access to the courts to enforce those rights.

8.5 With respect to the discontinuance of the legal proceedings in the Court, five authors argue that the notices of discontinuance signed on behalf of their tribe were not signed by those who had the authority to do so. Another five authors state that no notice of discontinuance was signed on behalf of their tribes.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee observes that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive.[13] As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.

9.3 The first issue before the Committee therefore is whether the authors' rights under article 27 of the Covenant have been violated by the Fisheries Settlement, as reflected in the Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant; it is further undisputed that the use and control of fisheries is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community.[14] The recognition of Maori rights in respect of fisheries by the Treaty of Waitangi confirms that the exercise of these rights is a significant part of Maori culture. However, the compatibility of the 1992 Act with the treaty of Waitangi is not a matter for the Committee to determine.

9.4 The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In particular, article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology. In this case the legislation introduced by the State affects, in various ways, the possibilities for Maori to engage in commercial and non-commercial fishing. The question is whether this constitutes a denial of rights. On an earlier occasion, the Committee has considered that:

> "A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his own culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27."[15]

9.5 The Committee recalls its general comment on article 27, according to which, especially in the case of indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them[16]. In its case law under the Optional Protocol, the Committee has emphasized that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.[17] The Committee acknowledges that the Treaty of Waitangi (Fisheries Settlement) Act 1992 and its mechanisms limit the rights of the authors to enjoy their own culture.

9.6 The Committee notes that the State party undertook a complicated process of consultation in order to secure broad Maori support to a nation-wide settlement and regulation of fishing activities. Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement. The Settlement was enacted only following the Maori representatives' report that substantial Maori support for the Settlement existed. For many Maori, the Act was an acceptable settlement of their claims. The Committee has noted the authors' claims that they and the majority of members of their tribes did not agree with the Settlement and that they claim that their rights as members of the Maori minority have been overridden. In such circumstances, where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected.[18]

9.7 As to the effects of the agreement, the Committee notes that before the negotiations which led to the Settlement the Courts had ruled earlier that the Quota Management System was in possible infringement of Maori rights because in practice Maori had no part in it and were thus deprived of their fisheries. With the Settlement, Maori were given access to a great percentage of quota, and thus effective possession of fisheries was returned to them. In regard to commercial fisheries, the effect of the Settlement was that Maori authority and traditional methods of control as recognized in the Treaty were replaced by a new control structure, in an entity in which Maori share not only the role of safeguarding their interests in fisheries but also the effective control. In regard to non-commercial fisheries, the Crown obligations under the Treaty of Waitangi continue, and regulations are made recognising and providing for customary food gathering.

9.8 In the consultation process, special attention was paid to the cultural and religious significance of fishing for the Maori, inter alia to securing the possibility of Maori individuals and communities to engage themselves in non-commercial fishing activities. While it is a matter of concern that the settlement and its process have contributed to divisions amongst Maori, nevertheless, the Committee concludes that the State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation, including the Quota Management System, are compatible with article 27.

9.9 The Committee emphasizes that the State party continues to be bound by article 27 which requires that the cultural and religious significance of fishing for Maori must deserve due attention in the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act. With reference to its earlier case law,[19] the Committee emphasizes that in order to comply with article 27, measures affecting the economic activities of Maori must be carried out in a way that the authors continue to enjoy their culture, and profess and practice their religion in community with other members of their group. The State party is under a duty to bear this in mind in the further implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act.

9.10 The authors' complaints about the discontinuance of the proceedings in the courts concerning their claim to fisheries must be seen in the light of the above. While in the abstract it would be objectionable and in violation of the right to access to court if a State party would by law discontinue cases that are pending before the courts, in the specific circumstances of the instant case, the discontinuance occurred within the framework of a nation wide settlement of exactly those claims that were pending before the courts and that had been adjourned awaiting the outcome of negotiations. In the circumstances, the Committee finds that the discontinuance of the authors' court cases does not amount to a violation of article 14 (1) of the Covenant.

9.11 With regard to the authors' claim that the Act prevents them from bringing claims concerning the extent of their fisheries before the courts, the Committee notes that article 14 (1) encompasses the right to access to court for the determination of rights and obligations in a suit at law. In certain circumstances the failure of a State party to establish a competent court to determine rights and obligations may amount to a violation of article 14 (1). In the present case, the Act excludes the courts' jurisdiction to inquire into the validity of claims by Maori in respect to commercial fishing, because the Act is intended to settle these claims. In any event, Maori recourse to the Courts to enforce claims regarding fisheries was limited even before the 1992 Act; Maori rights in commercial fisheries were enforceable in the Courts only to the extent that section 88 (2) of the Fisheries Act expressly provided that nothing in the Act was to affect Maori fishing rights. The Committee considers that whether or not claims in respect of fishery interests could be considered to fall within the definition of a suit at law, the 1992 Act has displaced the determination of Treaty claims in respect of fisheries by its specific provisions. Other aspects of the right to fisheries, though, still give the right to access to court, for instance in respect of the allocation of quota and of the regulations governing customary fishing rights. The authors have not substantiated the claim that the enactment of the new legislative framework has barred their access to court in any matter falling within the scope of article 14, paragraph 1. Consequently, the Committee finds that the facts before it do not disclose a violation of article 14, paragraph 1.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the articles of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Iwi: tribe, incorporating a number of constituent hapu (sub-tribes).

[2] Counsel submits that the Maori text contains a broader guarantee than is apparent from a bare reading of the English text. He explains that one of the most important differences in meaning between the two texts relates to the guarantee, in the Maori text, of "te tino rangatiratanga" (the full authority) over "taonga" (all those things important to them), including their fishing places and fisheries. According to counsel, there are three main elements embodied in the guarantee of rangatiratanga: the social, cultural, economical and spiritual protection of the tribal base, the recognition of the spiritual source of taonga and the fact that the exercise of authority is not only over property, but of persons within the kinship group and their access to tribal resources. The authors submit that the Maori text of the Treaty of Waitangi is authoritative.

[3] The Waitangi Tribunal is a specialized statutory body established by the Treaty of Waitangi Act 1975 having the status of a commission of enquiry and empowered inter alia to inquire into certain claims in relation to the principles of the Treaty of Waitangi.

[4] Hui: assembly.

[5] Marae: area set aside for the practice of Maori customs.

[6] The report showed also that 15 iwi representing 24,501 Maori, opposed the settlement and 7 iwi groups comprising 84,255 Maori were divided in their views.

[7] The National Maori Congress, a non-governmental organization comprising representatives from up to 45 iwi, and the New Zealand Maori Council, a body which represents district Maori councils throughout New Zealand.

[8] Breaches were claimed of sections 13 (freedom of thought, conscience and religion), 14 (freedom of expression), 20 (rights of minorities) and 27 (right to justice).

[9] Communication No. 167/1984, Views adopted on 26 March 1990, CCPR/C/38/D/167/1984, para. 32.2.

[10] Rangatiratanga: the ability to exercise authority over assets, both physical and intangible.

[11] Communication No. 205/1986, Views adopted on 4 November 1991, CCPR/C/43/D/205/1986.

[12] Waitangi Tribunal, *Muriwhenua Fishing Report*, pp. 180-181, para. 10.3.2.

[13] See the Committee's Views in case No. 167/1984 (Ominayak v. Canada), Views adopted on 26 March 1990, CCPR/C/38/D/167/1984.

[14] See inter alia the Committee's Views in Kitok v. Sweden, communication No. 197/1985, adopted on 27 July 1988, CCPR/C/33/D/197/1985, para. 9.2. See also the Committee's Views in the two Länsman cases, Nos. 511/1992, 26 October 1994 (CCPR/C/52/D/511/1992) and 671/1995, 30 October 1996 (CCPR/C/58/D/671/1995).

[15] Committee's Views on case No. 511/1992, Lansmann et al. v. Finland, CCPR/C/52/D/511/1992, para. 9.4

[16] General Comment No. 23, adopted during the Committee's fiftieth session in 1994, para. 3.2.

[17] Committee's Views on case No. 511/1992, I. Länsman et al. v. Finland, paras. 9.6 and 9.8 (CCPR/C/52/D/511/1992).

[18] See the Committee's Views in case No. 197/1985, Kitok v. Sweden, adopted on 27 July 1988, CCPR/C/33/D/197/1985.

[19] Committee's Views on case No. 511/1992, I. Länsman et al. v. Finland, para. 9.8, CCPR/C/52/D/511/1992.

APPENDIX

Individual opinion by Mr. Martin Scheinin (partly dissenting)

I concur with the main findings of the Committee in the case, related to article 27 of the Covenant. However, I express my dissent on paragraph 9.10 of the Views. In my opinion, the fact that an overall settlement of fisheries claims is found to be compatible with article 27, provided that the conditions of effective consultation and securing the sustainability of culturally significant forms of Maori fishing are met, does not exempt the State party from its obligations under article 14, paragraph 1. In my opinion, there has been a violation of the rights of the authors under article 14, paragraph 1, to the extent that:

- the legislation in question had the effect of discontinuing pending lawsuits instituted by the same authors or persons duly representing them;

- such discontinuation was not approved by the authors or other persons duly authorized to withdraw the lawsuit in question; and

- the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act or other measures provided by the State party have not resulted in those authors subject to discontinuation meeting the conditions above having received an effective remedy in accordance with article 2, paragraph 3, of the Covenant.

(Signed) M. Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

B. Communication No. 630/1995, Mazou v. Cameroon (Views adopted on 26 July 2001, seventy-second session)*

Submitted by:	Mr. Abdoulaye Mazou
Alleged victim:	The author
State party:	Cameroon
Date of communication:	31 October 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2001,

Having concluded its consideration of communication No. 630/1995 submitted to the Human Rights Committee by Mr. Abdoulaye Mazou under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 31 October 1994, is Abdoulaye Mazou, a Cameroonian citizen and professional magistrate, currently living in Yaoundé, Cameroon. He claims to be the victim of a violation by Cameroon of article 2, paragraph 3, article 14, paragraph 1, and article 25, subparagraph (c) of the International Covenant on Civil and Political Rights. The Covenant and the Optional Protocol entered into force for Cameroon on 27 September 1984.

The facts as submitted by the author

2.1 Following an attempted coup d'état in Cameroon in April 1984, the author, who at that time was a second class magistrate, was arrested on 16 April 1984. He was suspected of having sheltered his brother, who was wanted by the police for having taken part in the coup d'état.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

The author was found guilty and sentenced by the military court in Yaoundé to five years' imprisonment. According to the author, the charges against him were false, and no evidence was submitted and no witnesses were heard during the court proceedings. The trial was held in camera.[1]

2.2 While the author was detained, the President of Cameroon signed a decree on 2 June 1987 (No. 87/747) removing the author from his post as Secretary-General in the Ministry of Education and Chairman of the Governing Council of the National Sports Office. The Decree gave no reasons for the action and, according to the author, was issued in violation of article 133 of the Civil Service Statute.

2.3 On 23 April 1990 the author was released from prison but placed under house arrest in Yagoua, his birthplace, in the far north of the country. Not until the end of April 1991, following the adoption of the Amnesty Act of 23 April 1991 (No. 91/002), were the restrictions lifted. On the date of transmission of the communication, however, the presidential Decree of 2 June 1987 remained in force and the author had not been allowed to resume his duties.

2.4 On 12 June 1991 the author requested the President to reinstate him in the civil service. On 18 July 1991 he filed an appeal with the Ministry of Justice requesting the annulment of the presidential Decree of 2 June 1987. Receiving no response, on 9 September 1991 he applied for a judicial remedy to the administrative division of the Supreme Court, asking it to find that the Decree was illegal and ought therefore to be annulled. The author points out that although the Supreme Court has regularly ruled that such decrees should be annulled, as of 31 October 1994 the case had still not been settled.

2.5 On 4 May 1992, Decrees No. 92/091 and No. 92/092, setting out the terms of reinstatement and compensation of those covered by the Amnesty Act, were issued.

2.6 On 13 May 1992 the author applied to the Ministry of Justice for reinstatement in his post. Pursuant to Decree No. 92/091, his application was transmitted to the committee responsible for monitoring reinstatement in the civil service. On 12 May 1993 that committee issued an opinion in support of the author's reinstatement in the civil service. According to the author, however, the Ministry did not take action on this opinion.

2.7 On 22 September 1992 the author initiated proceedings before the administrative division of the Supreme Court to attack Decree No. 92/091 and Decree No. 92/092. In his view, the Decrees sought to block the full implementation of the Amnesty Act of 23 April 1991 which, he claims, provided for automatic reinstatement. This application was also pending at the time of submission of his communication.

2.8 In his initial communication the author stated that he had been out of work since being released from prison. He claimed that he was being persecuted for his opinions and on account of his ethnic origin. He added that other persons who had benefited from the Amnesty Act had been reinstated in their former posts.

2.9 At that time, the author stated that, in view of the silence of the judicial and political authorities, there were no further domestic remedies available to him.

2.10 Since the submission of his communication, however, the situation has improved significantly for the author; he was reinstated in his post on 16 April 1998 in accordance with a Supreme Court order of 30 January 1997 annulling Decree No. 87/747, the Decree removing him from his post.

The complaint

3. According to the author, the facts set out above constitute a violation of article 2, paragraph 3, article 14, paragraph 1, and article 25, subparagraph (c) of the Covenant. The author is asking the Committee to urge the State party to reinstate him in the civil service with retroactive effect and to award him damages in compensation for the injury done to him.

The State party's observations

4. In a note dated 13 May 1997 the State party informed the Committee that the administrative division of the Supreme Court, by an order dated 30 January 1997, had annulled Decree No. 87/747 (removing the author from his post).

The Committee's decision regarding admissibility

5.1 At its sixty-third session the Committee considered the admissibility of the communication.

5.2 At that time the Committee noted that the State party was not contesting the admissibility of the communication but had informed the Committee that the Supreme Court had annulled the Decree dismissing the author from his post. At the same time, the State party had not indicated whether the author had been reinstated in his post and if so, under what conditions, or if not, on what grounds. The Committee therefore decided that the communication should be considered on the merits.

5.3 Accordingly, on 6 July 1998 the Committee decided that the communication was admissible.

The State party's observations on the merits of the communication

6.1 By a letter dated 10 August 2000 the State party transmitted its observations regarding the merits of the communication.

6.2 The State party reports that pursuant to the Supreme Court decision of 30 January 1997 the author of the communication was reinstated as a second class magistrate in the Ministry of Justice as of 16 October 1998 and that his salary was calculated retroactive to 1 April 1987, the date on which he had been wrongfully suspended and subsequently dismissed.

The author's observations on the merits of the communication

7.1 In a letter dated 8 November 2000 the author transmitted his comments on the State party's observations.

7.2 The author first confirms that he was in fact reinstated in the Ministry of Justice and that the administration had indeed paid him his salary dating back to 1 April 1987.

7.3 However, the author considers that the administration did not fully grasp the significance of the Supreme Court decision of 30 January 1997. Given that the effects of that decision were retroactive, the author believes that he is entitled to have his career restored, i.e. to be reinstated at the grade he would have held had he not been dismissed. Despite his requests to the Ministry of Justice to that end, however, the author has yet to be informed of a decision.

7.4 The author is also requesting damages in compensation for the injury suffered by him following his dismissal.

The Committee's deliberations on the merits

8.1 The Human Rights Committee considered the communication in the light of the information provided by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee learned that, pursuant to the Supreme Court decision of 30 January 1997, the author had been reinstated in his post and that his salary had been paid retroactively from the date of his dismissal. However, there seems to be no question that the State party neither honoured the request for damages in compensation for the injury suffered nor sought to restore the author's career, which would have resulted in his being reinstated at the grade to which he would have been entitled had he not been dismissed.

8.3 The Committee notes, however, that the author chose to bring his complaint to the Ministry of Justice by means of a letter, and submitted no evidence showing that a judicial authority had effectively been asked to give a ruling on the question of damages. This part of the communication is inconsistent with the principle of exhaustion of domestic remedies as set out in article 5, paragraph 2 (b) of the Optional Protocol and must therefore be deemed inadmissible.

8.4 With regard to the author's allegations that the State party violated both article 2 and article 25 of the Covenant, the Committee considers that the Supreme Court proceedings that gave rise to the decision of 30 January 1997 satisfying the request that the author had made in his communication were unduly delayed, taking place more than 10 years after the author's removal from his post, and were not followed by restoration of his career on reinstatement, to which he was legally entitled in view of the annulment decision of 30 January 1997. Such proceedings cannot, therefore, be considered to be a satisfactory remedy in the meaning of articles 2 and 25 of the Covenant.

9. Consequently, the State party has an obligation to reinstate the author of the communication in his career, with all the attendant consequences under Cameroonian law, and must ensure that similar violations do not recur in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also invited to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] Note by the secretariat: The author has not attached any documentation relating to the criminal trial. The communication focuses primarily on the fact that he was not reinstated in his post.

C. Communication No. 675/1995, Toala et al. v. New Zealand (Views adopted on 2 November 2000, seventieth session)*

Submitted by:	Mr. Simalae Toala et al. (represented by Ms. Olinda Woodroffe)
Alleged victim:	The authors
State party:	New Zealand
Date of communication:	19 October 1995 (initial submission)
Prior decisions:	- Special Rapporteur's rule 91 decision transmitted to the State party on 21 December 1995 (not issued in document form) - CCPR/C/63/D/675/1995 - decision on admissibility, dated 10 July 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 November 2000,

Having concluded its consideration of communication No. 675/1995 submitted to the Human Rights Committee by Mr. Simalae Toala et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into consideration all written information made available to it by the authors of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The text of an individual opinion signed by members Amor, Bhagwati, Gaitan de Pombo and Solari Yrigoyen is appended to this document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Mr. Simalae Toala, Mrs. Fa'ai'u Toala, and their adopted child, Eka Toala, born in 1984, Mr. Pita Fata Misa Pitoau Tofaeono and Mrs. Anovale Tofaeono, all residing in New Zealand at the time of the communication. The authors claim to be victims of violations by New Zealand of articles 2 (1), 2 (3), 12 (4), 14 (3), 17 and 26 of the International Covenant on Civil and Political Rights. They are represented by Mrs. Olinda Woodroffe, of the New Zealand law firm, Woodroffe & Keil.

The facts submitted by the authors

2.1 The authors were all born in Western Samoa: Mr. Toala was born in 1932, Mrs. Toala in 1934, and their adopted child, Eka Toala, in 1984,[1] Mr. Tofaeono in 1934 and Mrs. Tofaeono in 1933. At the time of the communication, the families were residing in New Zealand, where deportation orders were recently issued against them. The families went into hiding in New Zealand, so as to avoid deportation. The authors claim that they are New Zealand citizens, and that the acts of the New Zealand Government which seek to remove them from New Zealand violate the Covenant.

2.2 Mr. Toala arrived in New Zealand in January 1979, and was granted a visitor's permit. He returned to Western Samoa in July 1979. In March 1980, he was convicted of the offence of "carnal knowledge" in Western Samoa, and sentenced to two years' imprisonment. He served nine months and was then released. He again entered New Zealand in December 1986, and applied on several occasions for a permanent residence permit; his applications were denied. In March 1992, a deportation order was issued against him in New Zealand, pursuant to the provisions of the New Zealand Immigration Act of 1987 (as amended). He appealed this order in April 1992, invoking humanitarian reasons. In August 1993, his appeal was dismissed by the Removal Review Authority, and he went into hiding so as to avoid deportation.

2.3 Mrs. Toala and Eka arrived in New Zealand in June 1986 and was granted a visitor's permit which expired in September 1989. She applied several times for permanent residence status. Of her eight children seven have permanent residence status in New Zealand and some are citizens. Deportation orders were issued against her and her adopted son in April 1992. She appealed the orders in May 1992, on her own and her son's behalf, invoking humanitarian reasons. In August 1993, the appeal was dismissed by the Removal Review Authority. It is stated that Mrs. Toala has been informed that she cannot stay in New Zealand because of her husband's conviction in Western Samoa. Mrs. Toala and her son have also gone into hiding to avoid deportation.

2.4 Mr. and Mrs. Tofaeono arrived in New Zealand in May 1993, and were granted residence permits valid until June 1995. They have 10 children, five of whom are residing lawfully in New Zealand. It is stated that Mr. and Mrs. Tofaeono qualify for "family reunion" status in New Zealand but that they have been denied this status for alleged health problems. The couple has appealed the deportation order issued against them to the Removal Review Authority. Their application was declined on 28 June 1996. They returned to Western Samoa, and Mr. Tofeano died there. Mrs. Tofeano remains in Western Samoa.

2.5 The authors claim that they are New Zealand citizens pursuant to the decision of the Judicial Committee of the Privy Council in Lesa v. The Attorney-General of New Zealand [1983] 2 A.C.20.[2] In this case, the Privy Council held that by virtue of the British Nationality and Status of Aliens (in New Zealand) Act 1928, persons born in Western Samoa between 13 May 1924 and 1 January 1949 (and their descendants) are New Zealand citizens.

2.6 It is stated that there was considerable adverse reaction in New Zealand to the Lesa judgement, which was delivered by the Privy Council in July 1982. It was estimated that some 100,000 Samoans out of a total population of 160,000 would be affected by the decision.

2.7 The response of the New Zealand Government was to negotiate a Protocol to the Treaty of Friendship between New Zealand and Western Samoa. The Protocol was ratified on 13 September 1982 by the two parties. Within one month, the New Zealand Government passed into law the Citizenship (Western Samoa) Act of 1982, which gave effect to the Protocol in New Zealand, and nullified the effect of the "Lesa" decision, except for Ms. Lesa herself and a very limited number of persons.

The complaint

3.1 The authors claim that the Citizenship (Western Samoa) Act 1982 has created a situation of mass denationalization of about 100,000 Samoans, in violation of articles 12, paragraph 4, and 26 of the Covenant, and denies them their lawful New Zealand citizenship.

3.2 The authors claim that the 1982 Protocol is void under article 53 of the Vienna Convention on the Law of Treaties, to the extent that it authorizes the enactment of the 1982 Act, because it violates a norm of jus cogens, insofar as it allows New Zealand to practice racial discrimination against Samoans.

3.3 In this context, the authors refer to statements made by the New Zealand Human Rights Commission in 1982, to the effect that "the Human Rights Commission considers that the Citizenship (Western Samoa) Bill involves the denial of basic human rights in that it seeks to deprive a particular group of New Zealanders of their citizenship on the basis that they are Polynesians of Samoan descent. ... The Bill as it stands has an unfortunate racist implication. ... There appears to be a confusion between the principle of citizenship rights, and the practical consequences of large-scale entry of people from Western Samoa ...".

3.4 The authors furthermore invoke the parliamentary debates which preceded the adoption of the 1982 Act in support of their claim that the Act has racist implications. They quote from the debates: "... We have many other citizens with dual citizenship, I would say, the greatest number being from the U.K. ... almost all the people to whom the Bill relates are nonwhites." and: "The Human Rights Commission drew attention to article 12 of the International Covenant on Civil and Political Rights. That Covenant provides that no person shall be arbitrarily deprived of the right to enter his own country. I should be surprised if New Zealand were not in breach of that right in refusing to allow free entry to New Zealand of Western Samoans deemed to be, and always to have been, New Zealand citizens."

3.5 The authors also refer to a statement of the Chief Justice of New Zealand, Justice Ryan[3] "[The legislation] clearly discriminates against persons who were declared by the highest New Zealand Court to be citizens of New Zealand." The authors further invoke the discussion concerning New Zealand's Initial Report to the Human Rights Committee dated 11 January 1982, where the representatives of the state, in connection with the Lesa case referred, inter alia, to the Mandate created by the League of Nations. They note that it was declared that the inhabitants of mandated territories could not become citizens of the State which administered the Mandate.

3.6 The authors have close ties to New Zealand in that both families have several of their children living in New Zealand. Mr. and Mrs. Toala have eight children, seven have permanent residence status in New Zealand and some are citizens. Mr. and Mrs. Tofaeono have ten children of which five are living in New Zealand. Both are close-knit families. Counsel claims that the denial of citizenship to the authors constitutes a violation of their right to family reunification under article 17 of the Covenant.

3.7 Concerning the requirement of exhaustion of domestic remedies the authors claim that there is no remedy available in New Zealand to someone whose rights have been infringed by Statutes which violate or are said to violate the Covenant. A Statute duly enacted by Parliament cannot be declared invalid by any New Zealand Court or other tribunal. The authors refer to the New Zealand Bill of Rights Act 1990, where it is stated that "[N] o court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or effective; or (b) Decline to apply any provisions of the enactment - by reasons only that the provisions are inconsistent with any provisions of this Bill of Rights." The authors contend that this section has been interpreted as meaning that any statute, whether enacted before or after the passage of the Bill of Rights Act 1990, shall be superior to that Act. Since there are references, in the title of the Bill of Rights Act, to "New Zealand's commitment to the International Covenant on Civil and Political Rights", any statute (whether enacted before or after the Bill of Rights Act 1990) has precedence over any Covenant protection as reflected in the Bill of Rights Act 1990.

3.8 The authors claim that since there are no domestic remedies to exhaust where an author is aggrieved by a Statute which violates the Covenant, the State party has violated article 2 (3) of the Covenant.

3.9 Furthermore, the authors claim that the fact that there is no provision for legal aid for the preparation of communications to the Human Rights Committee, under the New Zealand Legal Services Act of 1991, amounts to a violation of article 14, paragraph 3 (d), of the Covenant.

3.10 Finally, the authors request the Committee to adopt interim measures of protection so as to prevent irreparable damage, and, in particular, to request the New Zealand Government not to take any steps to deport the authors, pending the Committee's determination of the merits of the communication.[4]

State party's comments and counsel's observations thereon

4.1 In a submission dated 6 June 1996, the State party contends that the communication should be declared inadmissible for non-exhaustion of domestic remedies. It contends that Mr. Toala, his wife and son have indicated their intention to apply to the Courts to seek judicial review of the removal orders, while the other two authors Mr. and Mrs. Tofaeono are engaged in domestic proceedings. With respect to the allegation made by the authors that there are no domestic remedies available to them in violation of the Covenant the State party contends that the reason the authors can find no remedies available for their claims is because these do not fall within the scope of the Covenant, rather than because New Zealand does not provide remedies for possible violations of the Covenant.

4.2 The State party contends that the communication should be declared inadmissible *ratione temporis* since the Optional Protocol came into force for New Zealand on 26 August 1989 and the events complained of by the authors occurred in 1982. It further contends that the only circumstances under which the Committee would be competent to consider this case would be if there were continuing effects, which in themselves constituted a violation of the Covenant, and the State party categorically denies that continuing effects exist.

4.3 The State party further contends that the communication should be declared inadmissible *ratione materiae* as incompatible with the provisions of the Covenant. With respect to the allegations under article 12, paragraph 4, of the Covenant, the State party contends that the authors' complaint is in fact a challenge to the non concession of a residence permit for the authors to stay in New Zealand and the deportation order, but instead of this what the authors have done is to challenge the 1982 Act. The State party contests that the authors have in any way been deprived of the possibility to enter their own country since they have always been Western Samoans and they have no restriction to enter Western Samoa.

4.4 With respect to the allegation of a violation of article 17 and the right to family life in the cases of Mr. and Mrs. Toala and their son, the State party notes that indeed it did take into consideration family issues, when deciding on the authors' application for residency. However, as the principal applicant was a prohibited migrant, residency was denied to the family.

4.5 With respect to the allegation of violation of article 14, paragraph 3, of the Covenant in respect of the failure of the State party to provide legal aid to pursue their claim before the Human Rights Committee, the State party notes that article 14, paragraph 3, refers to criminal charges only. Furthermore, there is no requirement under the Optional Protocol or its rules of procedure for the provision of legal aid to a communicant.

4.6 With respect to the discrimination claim on the basis of race in violation of articles 26 *juncto* article 2, paragraph 1, of the Covenant because the 1982 Act only applied to Western Samoans, the State party points out that the Act was enacted to resolve the anomaly in New Zealand legislation revealed by the Privy Council in the *Lesa* decision, related solely to individuals born in Western Samoa between 1924 and 1949. The State party argues that, had the Privy Council found that some other group of people with no genuine and effective link with New Zealand, also inadvertently been given the status of New Zealand citizens, they too would have been treated in the same manner.

5. Counsel reiterates the claims submitted in the original communication regarding denial of access to their own country, deprivation of citizenship, discrimination with regard to obtaining a possible residence permit and the denial of the right to family reunion.

The Committee's admissibility decision

6.1 At its sixty-third session, the Committee considered the admissibility of the communication.

6.2 With regard to the allegation that the authors' right under article 14, paragraph 3, had been violated since New Zealand did not make legal aid available in order to submit a communication to the Human Rights Committee, the Committee noted that article 14 refers to domestic procedures only and there is no separate provision in the Covenant or the Optional Protocol dealing with the obligation to provide legal aid to complainants under the Optional Protocol. In the instant case, the Committee considered that the authors had no claim under article 3 of the Optional Protocol, and accordingly this part of the communication was inadmissible.

6.3 The authors claimed that they were, pursuant to the Lesa ruling, New Zealand citizens and consequently, had the right to freely enter and reside in New Zealand territory, despite the 1982 Act which stripped them of their New Zealand citizenship. The legislation in question was enacted in 1982 after New Zealand had ratified the International Covenant on Civil and Political Rights, but before it ratified the Optional Protocol in 1989. The Committee considered, however, that the legislation in question may have continuing effects which in themselves could constitute a violation under article 12, paragraph 4, of the Covenant. The issue of whether these continuing effects were in violation of the Covenant was one which should be examined on the merits. The Committee considered therefore that it was not precluded ratione temporis from declaring the communication admissible.

6.4 With respect to the authors' claims under articles 17 and 26 of the Covenant, that they had a right to remain in New Zealand despite the deportation orders and a right to family reunification without discrimination, the Committee noted the State party's contention that the communication should be declared inadmissible for non exhaustion of domestic remedies. It was not apparent to the Committee that any remedies that might still be available to the authors would be effective to prevent their deportation. These claims therefore could raise issues under articles 17 and 26 of the Covenant as well as under article 23, which should be considered on the merits. They could also raise issues under article 16 of the Covenant in respect of Mrs. Toala and her son, Eka Toala since they were not treated as persons in their own right but rather as addenda to Mr. Toala who was considered a prohibited migrant, for a criminal offence in Western Samoa; these issues should be considered on the merits. The Committee did not find itself precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 The State party and the authors' counsel were requested to inform the Committee of whether any remedies that might be or have been available to the authors would have suspensive effects in respect of their deportation.

7. On 10 July 1998, the Human Rights Committee decided that the communication was admissible insofar as it appeared to raise issues under articles 12, paragraph 4, 17, 23 and 26 in respect of all the complainants and under article 16 of the Covenant in respect of Mrs. Toala and her son, Eka Toala.

State party's submission on the merits and the authors' comments thereon

8.1 By submission dated 12 February 1999 the State party submits that the authors' complaints centre on their assertion that the New Zealand Government acted arbitrarily, and improperly, contrary to the Covenant, in enacting the Citizenship (Western Samoa) Act 1982.

8.2 The State party adduces information in detail demonstrating that Western Samoa was not generally considered part of Her Majesty's dominions, and that the inhabitants of Western Samoa were in the periods in question considered not as British subjects/New Zealand citizens respectively but as possessing a special other status in conformity with the special nature of the Mandate and Trusteeship. The State party further submits that the expectation was that on and from its independence in 1962, Western Samoans possessed and should possess only the citizenship of Western Samoa, and that the legislative action taken by the New Zealand Government in 1982 (after consultation with and with the concurrence of the Government of Western Samoa) to correct the outcome of Lesa's case was directed to deal with the large and completely unexpected problem of dual nationality arising therefrom. It further maintains that its actions in that respect were based on reasonable and objective criteria, were in conformity with general international law and for a general purpose legitimate under the Covenant (including article 1 on self-determination), and thus did not constitute, as to persons affected thereby, a discrimination prohibited by the Covenant. The State party accordingly, maintains that it is not in breach of articles 26 and 2.1 of the Covenant.

8.3 As to article 12, paragraph 4, of the Covenant, the State party submits that the authors of the communication, not being New Zealand citizens, were validly subject to the provisions of New Zealand's Immigration Act 1987 under which their removal from New Zealand has been ordered, that the authors possess an entitlement to enter Western Samoa, and that they have accordingly not been arbitrarily deprived of the right to enter their own country in violation of article 12, paragraph 4.

8.4 In respect of the authors' and the Human Rights Committee's comments that the 1982 citizenship legislation of New Zealand may have "continuing effects" that could in themselves constitute a violation of article 12, paragraph 4, of the Covenant, the State party maintains its position that no such continuing effects exist and consequently this part of the communication should be declared inadmissible ratione temporis.

8.5 As to article 17 (1) of the Covenant, the State party submits that Mr. and Mrs. Toala and Eka Toala, not being New Zealand citizens, were validly subject to the provisions of the Immigration Act 1987, that their family situation was carefully and reasonably assessed by the New Zealand authorities including a competent appeal tribunal (the Removal Review Authority) which concluded that there are no sufficient grounds to countermand their removal. It submits that the removal orders in regard to the authors did not constitute either an arbitrary or an unlawful interference with the family of the Toalas contrary to article 17 (1) of the Covenant.

8.6 As to article 2 (3) of the Covenant, the State party submits that the authors of the communication have not proven their general assertion that there are no local remedies in New Zealand which can be exhausted where an author is aggrieved by a statute which violates or is alleged to violate the Covenant. In this respect, the State party refers to a series of decisions of the New Zealand Courts in which the Covenant has been invoked. It contends that the authors of the submission err in asserting in general terms that "there is no remedy available in New Zealand to someone who is aggrieved by a Statute which violates or is alleged to violate the Covenant".

8.7 The State party further notes in any event that it is not open to complainants under the Optional Protocol to assert such a proposition in the abstract, as the Optional Protocol requires complainants to show that they have been particularly and concretely affected - in this instance by the absence of an effective remedy - in violation of an article of the Covenant. To the extent that the authors appear to argue that they have no effective remedy against section 6 of the Citizenship (Western Samoa) Act 1982 which withheld New Zealand citizenship from the class of Western Samoans affected by it, the State party maintains that, as this measure as such did not breach any article of the Covenant, the question of the absence of an effective remedy against the operation of the section does not fall for consideration.

8.8 As to the Human Rights Committee's request that the New Zealand Government and the authors' counsel inform the Committee whether any remedies that might be or have been available to the authors would have suspensive effects in respect of their removal, the State party explains the following procedures which apply under the Immigration Act 1987 to persons who have been made the subject of a removal order. These include:

- Appeal to the Removal Review Authority within 42 days of the date on which the removal order was served. An appeal to the Removal Review Authority can be lodged either on the ground that the person is not unlawfully in New Zealand, or on the basis of exceptional humanitarian circumstances. A removal order cannot be executed while an appeal to the Removal Review Authority is pending.

- An appeal against the determination of the Removal Review Authority may be lodged in the High Court, only in relation to questions of law, and within 28 days after the party has been notified of the Removal Review Authority's decision. A removal order cannot be executed while such an appeal is pending.

- Upon leave, a party may appeal the High Court's decision in the Court of Appeal, in respect of a point of law. The execution of a removal order is suspended while such an appeal is pending.

- A party may also apply to the High Court for judicial review of the Removal Review Authority's decision. An application can be made for interim relief to suspend the execution of the removal order. There is no formal time restriction for such an application. The decision of the High Court may also be appealed in the Court of Appeal as being erroneous in point of law.

- A party may also request a special direction from the Minister of Immigration. This avenue is open to complainants even when all other legal avenues have been exhausted.

8.9 As to the extent to which the authors of the communication have availed themselves of the above procedures, the State party notes that both Mr. and Mrs. Toala and their son Eka Toala appealed against removal to the Removal Review Authority. Their appeals were declined by the Removal Review Authority on 13 August 1993. Mr. and Mrs. Tofeaono both appealed against removal to the Removal Review Authority. Their appeals were declined by the Authority on 28 June 1996. Neither of the authors lodged an appeal against the Removal Review Authority decision to the High Court, nor have they lodged judicial review proceedings. In April 1995 the Tofaeono representative informed the New Zealand Immigration Service (NZIS) that a case for judicial review was being prepared. No such case was filed. Similarly, in 1993 the NZIS was notified by Mr. Toala's representative that the Toalas would be seeking judicial review of the Removal Review Authority decision. No such proceedings were lodged, and the removal orders against the Toala family were reactivated in 1994. Since the decisions of the Removal Review Authority in 1993 and 1996 respectively, only the Toalas have made an application to the Minister of Immigration for a special direction under section 130 of the Immigration Act 1987. This application, dated 13 January 1999, seeks the cancellation of the removal orders affecting the Toalas, and the grant of permits to them, so that they may lawfully remain in New Zealand pending the outcome of their existing communication before the Human Rights Committee.

8.10 As to the comment of the Human Rights Committee[5] that the communication may raise issues under article 16 of the Covenant in respect of Mrs. Toala and her son Eka Toala, the State party contends that a complaint as to article 16 of the Covenant has not been advanced by the authors themselves or their representatives. The State party also observes that the members of the Toala family certainly had and have a right to recognition as individuals before the law when invoking the Immigration Act, but that they chose in 1987 and again in 1989 to apply for permanent residence in New Zealand while seeking to avail themselves of the Government's Family Category residence policy as a family unit, not as individuals, thereby effectively waiving that right as a matter of choice.

8.11 The State party contends that there is no compulsion, in processes under the Immigration Act and Regulations, for applicant family members to be combined; the position is that a spouse and children can be included in an applicant's application, in which case the latter becomes the principal applicant. Mrs. Toala and Eka Toala could thus have been considered in their own right as principal applicants had they chosen to lodge separate applications. The State party explains that when a generalized application is made, the principal applicant is the person to whom the normal criteria of residence policy are applied, although all persons included in the application must meet the character and health requirements. Mr. Toala was the principal applicant in the residence application that included Mrs. Toala and Eka Toala, but did not meet character requirements. The State party submits that choices voluntarily made by the Toalas in order to gain consideration of family circumstances under the immigration legislation governed any treatment of them as a group by the New Zealand immigration authorities, and that no breach of article 16 of the Covenant in relation to them was created by action of the

New Zealand authorities. The State party further notes that removal orders were served separately on Mr. Toala, and on Mrs. Toala and son Eka, respectively. These orders were appealed separately by Mr. Toala, and by Mrs. Toala and Eka, to the Removal Review Authority. In its decision of 13 August 1993, the Authority specifically refers to Mr. Toala's case, as well as "the cases of his wife and son" having had "the fullest consideration".

9.1 In her comments counsel states that the conflict between New Zealand and the authors still stands. She contends that the bulk of the State party's submission is devoted to challenging the Privy Council's decision in Lesa v. Attorney-General of New Zealand.

9.2 Counsel reiterates the original claim that the authors are Samoan and that the Judicial Committee of the Privy Council made it clear that New Zealand is the authors' own country. She contends that when New Zealand passed a law depriving the authors of New Zealand Citizenship, it placed the authors into a category of aliens which the New Zealand Government could legitimately exclude from New Zealand. In that sense, she submits that the authors are deprived of their rights under article 12, paragraph 4, of the Covenant. Counsel states that what article 12, paragraph 4, says is that once citizenship is granted to people, they cannot be deprived of it, if depriving them of it means limiting their rights to enter their country of citizenship. That is what the New Zealand Parliament has done to many Samoan people including the authors.

9.3 With respect to the claims under articles 17, 23 and 26 counsel reiterates the allegations made in the original submission, that is to say that the authors were discriminated against because of their Polynesian origins and that the Removal Review Authority did not give due consideration to the family and humanitarian circumstances of the authors' case.

9.4 With regard to the exhaustion of domestic remedies, counsel reiterates that, since the authors' arguments against their removal are based on the invalidity of the Citizenship (Western Samoa) Act 1982, and since no judicial review of a statute is possible under New Zealand law, the remedy of judicial review is not open to the authors.

Review of admissibility

10. The Committee notes that the State party has provided information about the procedures open to the authors to seek judicial review of the decision of the Removal Review Authority. It appears that although the authors had indicated that they intended to make use of this procedure, they did not do so. The authors have not advanced reasons for their failure to pursue these remedies in respect to their claim that their removal from New Zealand would violate their rights under articles 17 and 23, and with respect to Mrs. Toala and son Eka Toala, article 16 of the Covenant. In the circumstances, the Committee considers that the authors have failed to exhaust available domestic remedies in this respect. Consequently, the Committee, in accordance with rule 93 (4) of its rules of procedure, reviews its decision on admissibility and declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Examination of the merits

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

11.2 With regard to the authors' claim to enter and remain in New Zealand the Committee notes that this claim depends on whether under article 12, paragraph 4, of the Covenant New Zealand is or has been at any time their own country and if so, whether they have been deprived arbitrarily of the right to enter New Zealand. In this regard, the Committee notes that none of the authors holds New Zealand nationality at present, nor do they have entitlement to that nationality under New Zealand law. It also notes that all the authors are Western Samoan citizens under the nationality law of that country, which has applied since 1959.

11.3 The Committee notes that the effect of the 1982 Lesa decision was to make four of the authors New Zealand citizens, as from the date of their birth. The fifth author Eka Toala was born in 1984, and appears not to have been affected by Lesa. The four authors who had New Zealand nationality under the Lesa decision, were by virtue of that fact entitled to enter New Zealand. When the 1982 Act took away New Zealand citizenship it removed their right to enter New Zealand as citizens. Their ability to enter New Zealand thereafter was governed by New Zealand immigration laws.

11.4 The Committee's general comment on article 12 observes that "A State party must not by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent that person from returning to his or her own country." In this case, the Committee considers that the circumstances in which the authors gained and then lost New Zealand citizenship need to be examined in the context of the issues which arise under article 12 (4).

11.5 The Committee notes that in 1982 the authors had no connection with New Zealand by reason of birth, descent from any New Zealander, ties with New Zealand or residence in New Zealand. They were unaware of any claim to New Zealand citizenship at the time of the Lesa decision and had acquired New Zealand citizenship involuntarily. It also appears that, with the exception of Mr. Toala, none of the authors had ever been in New Zealand. All these circumstances make it arguable that New Zealand did not become their "own country" by virtue of the Lesa decision. But in any event, the Committee does not consider that the removal of their New Zealand citizenship was arbitrary. In addition to the circumstances already mentioned, none of the authors had been in New Zealand between the date of the Lesa decision and the passage of the 1982 Act. They had never applied for a New Zealand passport or claimed to exercise any rights as New Zealand citizens. The Committee is therefore of the view that article 12 (4) was not violated in the authors' case.

11.6 As to the claim that the 1982 Act was discriminatory, the Committee observes that the Act applied only to those Western Samoans were not resident in New Zealand and that the authors at that time were not resident in New Zealand and had no ties with that country. There is no basis for concluding that the application of the Act to the authors was discriminatory contrary to article 26 of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the articles of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] It is stated that Eka Toala is adopted by Mr. and Mrs. Toala, and as a descendent to them entitled to all rights that they are entitled to; reference is made to the New Zealand Adoption Act 1955, section 16 (2): "The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock."

[2] Judgement delivered on 28 July 1982.

[3] Constitutional Reference: In re: Application by Father Ioane Vito and Others [1988], S.P.L.R. 429 at 435.

[4] The Committee declined to adopt such measures.

[5] See paragraph 6.4 above.

APPENDIX

Individual opinion by Abdelfattah Amor, Prafullachandra Natwarlal Bhagwati, Pilar Gaitan de Pombo and Hipólito Solari Yrigoyen

The majority members have reviewed the admissibility of the communication and taken the view that on account of non-exhaustion of domestic remedies, the communication must be held to be inadmissible. We find it difficult to take this apparently easy route in order to by-pass a decision on merits which might possibly lead to a rather inconvenient result. The Committee considered the question of admissibility at the stage of admission and held it admissible inter alia under articles 17 and 23. We do not see any reason to change this view. We have gone through the case of Tavita v. the Minister of Immigration [1994] as also the case of Puli'uvea v. Removal Authority [1996]. We find that in those cases the decision of the Minister of Immigration in one case and the decision of the Removal Review Authority in the other were challenged in the Court of Appeal on merits on the ground that they were in violation of the international obligations undertaken by New Zealand. But here in the present case, it was a Parliamentary legislation of New Zealand which stood in the way of the authors so far as the claim under article 12 (4) of the Covenant was concerned and it is extremely doubtful whether the Court of Appeal would have jurisdiction to ignore a Parliamentary Statute and give relief to the authors. Moreover, the decision of the Removal Review Authority was given in August 1992 and at that date, it was extremely doubtful whether international obligations would be enforceable by the Courts in New Zealand in the absence of domestic legislation. It was only in 1994 when Tavita's case was decided that the position became clear but by that time, the period of limitation for filing an appeal before the Court of Appeal under section 115A had expired. We are therefore of the view that the communication cannot be regarded as inadmissible on the ground of non-exhaustion of domestic remedies.

We note that Mr. and Mrs. Toala have no children in Western Samoa who can take care of them and that the children in New Zealand are the only care providers. The authors have lived in New Zealand since 1986 and have developed effective family ties there. The refusal by the State party to regularize the stay of all three authors is mainly based on Mr. Toala's criminal conviction in 1980. The material before the Committee does not show that adequate weight was given to the family life of the authors. We are of the view that in the particular circumstances of the case, to refuse to allow the authors to reside in New Zealand with the adult/children of Mr. and Mrs. Toala who are their only care providers is disproportionate and would, hence constitute arbitrary interference with their family. Consequently we find a violation of articles 17 and 23 in regard to Mr. and Mrs. Toala and their son Eka.

(Signed) Abdelfattah Amor

(Signed) Prafullachandra Natwarlal Bhagwati

(Signed) Pilar Gaitan de Pombo

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

D. Communication No. 687/1996, Rojas García v. Colombia (Views adopted on 3 April 2001, seventy-first session)*

Submitted by: Mr. Rafael Armando Rojas García

Alleged victim: The author

State party: Colombia

Date of communication: 30 August 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 2001,

Having concluded its consideration of communication No. 687/1996 submitted to the Human Rights Committee by Mr. Rafael Armando Rojas García, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Rafael Armando Rojas García, a Colombian citizen, writing on his own behalf and on behalf of his elderly mother, his two children, his brother and two sisters, three nieces and a domestic helper. He claims that they are the victims of violations by Colombia of article 7, article 14, paragraph 3 (a), article 17, paragraphs 1 and 2, article 19, paragraph 3 (a), article 23 and article 24 of the International Covenant on Civil and Political Rights. The facts as submitted seem to raise an issue also under article 9, paragraph 1, of the Covenant.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfic Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

Under rule 85 of the Committee's rules of procedure, Mr. Rafael Rivas Posada did not participate in the examination of the case.

The text of an individual opinion by Committee members Nisuke Ando and Ivan A. Shearer is appended to the present document.

The facts as submitted by the author

2.1 On 5 January 1993, at 2 a.m., a group of armed men wearing civilian clothes, from the Public Prosecutor's Office (*Cuerpo Técnico de Investigación de la Fiscalía*), forcibly entered the author's house through the roof. The group carried out a room-by-room search of the premises, terrifying and verbally abusing the members of the author's family, including small children. In the course of the search, one of the officials fired a gunshot. Two more persons then entered the house through the front door; one typed up a statement and forced the only adult male (Alvaro Rojas) in the family to sign it; he did not allow him to read it, or to keep a copy. When Alvaro Rojas asked whether it was necessary to act with such brutality, he was told to talk to the Public Prosecutor, Carlos Fernando Mendoza. It was at this juncture that the family was informed that the house was being searched as part of an investigation into the murder of the mayor of Bochalema, Ciro Alonso Colmenares.

2.2 On the same day, Alvaro Rojas filed a complaint for unlawful entry into the family house with the Provincial Attorney-General's Office in Cúcuta (*Procuraduría Provincial de Cúcuta*). An inquiry was initiated by the provincial authorities, which was not only not duly completed but was simply shelved on 3 November 1993. The author was not informed about the discontinuation of his complaint. He filed a new complaint with the Administrative Police in Bogotá (*Procuraduría General de la Nación, Procuraduría Delegada de la Policía Judicial y Administrativa*). The new complaint was also shelved on 24 June 1994, purportedly on the principle of double jeopardy. The author then submitted the case to the Administrative Tribunal in Cúcuta in order to obtain some form of reparation for the raid on his house and the use of a firearm.

The complaint

3.1 The author claims that the violent assaults on the family home resulted in a severe nervous trauma, psychologically affecting the author's sister, Fanny Elena Rojas García, who was an invalid. She subsequently died, on 8 August 1993, the violent search being considered the indirect cause of her death. Similarly, the author's mother, aged 75, never quite recovered from the shock of the search.

3.2 The author states that the authorities, far from conducting a diligent investigation into the matter, have done everything possible to cover up the incident. No attempt was ever made to establish the responsibility either of the authorities that authorized the raid or of those who carried it out, including the officer who fired a gun in a room where there were young children.

3.3 The author contends that the events described constitute violations of article 7, article 14, paragraph 3 (a), article 17, paragraphs 1 and 2, article 19, paragraph 3 (a), article 23 and article 24 of the Covenant.

The State party's observations and the author's reply

4.1 By submission of 12 November 1996, the State party argues that the author failed to exhaust domestic remedies, as an inquiry that may lead to disciplinary action is still under way in respect of the officers who raided the author's house.

4.2 The State party further argues that the entry into the author's house fulfilled all the legal requirements of article 343 of the Code of Criminal Procedure and was therefore within the scope of the law. The search was ordered by an officer of the court, Miguel Angel Villamizar Becerra, and was carried out in the presence of a prosecutor. In this respect, it is stated that all the pertinent documentation regarding the possible responsibility of the officials taking part in the raid was requested by the National Prosecutor (*Fiscalia General*) from its internal investigation section (*Veeduría*) in order to establish whether any disciplinary action was necessary. Reference is also made to a disciplinary inquiry carried out by the Investigating Office (*Dirección Seccional del Cuerpo Técnico de Investigación*) as well as by the Prosecutor for internal affairs in the police (*Procuraduría Delegada para la Policía Judicial*), both of which were filed.

5. On 22 January 1997, the author reiterates that the search was illegal since article 343 of the Code of Criminal Procedure does not provide for night-time "commando-like" actions, rooftop entries, firing into the air, etc. He states that the military prosecutor (*Fiscal Delegado ante las Fuerzas Armadas*) was *not* present, and that the prosecutor appeared only at the very end of the events and then only to draw up a record, of which no copy was given to the author's brother. The author reiterates the far-reaching repercussions that the house search had on his family, that his family was branded as the murderers of the ex-mayor, that his sister died after the raid, and that his mother and children continue to suffer from trauma. The author notes that the administrative procedures initiated in 1993 have not produced any results to date.

6. On 14 October 1997, the State party informed the Committee of its inquiries into the status of the administrative proceedings in the case. The National Public Prosecutor's Office (*Fiscalia General de la Nación*) requested information from the investigating office in Cúcuta (*Dirección Seccional del Cuerpo Técnico de Investigación*) as to whether proceedings had been initiated in respect of officer Gabriel Ruiz Jiménez. By 30 April 1997, no proceedings had been initiated. The request was reiterated in June, July and August 1997, again with negative results. The State party affirms that investigations continue and that, consequently domestic remedies have not been exhausted.

The Committee's decision on admissibility

7.1 At its sixty-second session, the Committee considered the admissibility of the communication and took note of the State party's request that the communication should be declared inadmissible for failure to exhaust domestic remedies. The Committee considered that in the circumstances of the case, it must be concluded that the author had diligently but unsuccessfully pursued remedies aimed at establishing responsibility for the raid on his house. More than five years after the events (at the time the decision on admissibility was taken), those responsible for the incident had not been identified or indicted, let alone tried. The Committee concluded that in the circumstances, domestic remedies had been "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

7.2 As to the author's allegations under article 14, paragraph 3 (a), article 19, paragraph 3 (a), article 23 and article 24 of the Covenant, the Committee observed that these remained of a general nature and had not been further substantiated. There was nothing to indicate, for example that criminal charges had been brought against the author of which he had not been promptly informed (art. 14, para. 3 (a)) or that he had been denied freedom of expression (art. 19), and no description was given of how the State had interfered in his family life or violated the rights of his children (arts. 23 and 24).

7.3 With respect to the remaining allegations, under article 7 and article 17, paragraphs 1 and 2 of the Covenant, the Committee considered that they had been sufficiently substantiated for purposes of admissibility and that they should accordingly be considered on their merits.

The State party's observations and the author's comments

8.1 By submission of 28 December 1999, the State party reiterates its position on the inadmissibility of the complaint and states that, in its view, no violation of any of the articles of the International Covenant on Civil and Political Rights has taken place.

8.2 The State party notes, as did the author, that the investigating office in Cúcuta (*Cuerpo Técnico de Investigación de la Fiscalia, Seccional Cúcuta*) carried out an administrative inquiry into the incident that occurred on 5 January 1993 during the raid on the Rojas García family house and on 3 November 1993 ordered it to be discontinued as groundless. In addition, following the inquiry into the events, a preliminary investigation was ordered against Gabriel Ruiz Jiménez, the person who fired the shot during the raid. According to the Prosecutor for internal affairs in the police (*Procuraduría Delegada*), there are no grounds whatsoever for pursuing the preliminary inquiry, since it has been shown that a disciplinary inquiry into the same events was initiated and completed by the Attorney-General's Office, through the Director of the investigating office in Cúcuta (*Seccional del Cuerpo Técnico de Investigación de Cúcuta*), and was subsequently shelved (See paragraph 2.2).

8.3 In an official letter dated 10 May 1999, the Attorney-General's Office reiterated that the Director of the investigating office in Cúcuta, who opened the preliminary disciplinary inquiry against Gabriel Ruiz Jiménez, had shelved the case because he considered that the shot fired by Jiménez had been accidental and not the result of negligence or misconduct by the accused, and that there were therefore no grounds for initiating a formal investigation.

8.4 With regard to the psychological traumas caused to the house occupants by the ensuing panic, the State party maintains that it is up to an expert medical witness to determine their existence during the administrative hearing now under way.

8.5 The State party reports that the author has filed suit for reparation for the damages allegedly incurred in connection with these events, with the Administrative Tribunal of Norte de Santander.

8.6 The State party does not share the Committee's view that, more than five years after the events, those responsible for the incident have not been identified or indicted. For the State party, it is clear that a search was carried out by members of the investigating office in Cúcuta (*Cuerpo Técnico de Investigación de la Fiscalia, Seccional Cúcuta*) in accordance with article 343 of the Code of Criminal Procedure, which stipulates:

> "Searches, procedure and requirements. Where there are serious grounds for believing that a person who is the subject of an arrest warrant, or weapons, instruments or items used in committing an offence or produced by an offence, are to be found in a building, vessel or aircraft, a court official may issue a court order for search and seizure duly stating the reasons.
>
> "The court order referred to in the preceding paragraph does not require notification."

8.7 The State party therefore considers that responsibility for any irregularities in the performance of its duties must be determined by inquiries carried out by the competent State bodies. With regard to the alleged responsibility of Mr. Gabriel Ruiz Jiménez, the Attorney-General's Office has established that it was the result of an accident.

8.8 In respect of the Committee's reference to unreasonably prolonged domestic remedies, within the meaning of article 5, paragraph 2 (b), of the Optional Protocol the State party wishes to make the following comments:

> (1) Since the date of the incident, the brother of the author of the complaint has availed himself of the remedies provided in domestic law before the Attorney-General's Office, which, acting through the Administrative Police in Bogotá, issued an order on 24 June 1994 to shelve the investigation on the grounds that the National Public Prosecutor's Office, through the investigating officer in Cúcuta (*Cuerpo Técnico de Investigación de Cúcuta*), had initiated and completed a disciplinary inquiry into the same events. The State party points out that the mere fact that a domestic remedy does not find in favour of the complainant does not in itself mean that effective domestic remedies do not exist or have been exhausted. Clearly, in a case such as this, if a remedy is not appropriate, then it should not be exhausted but another, more appropriate procedure should be used.
>
> (2) Mr. Rojas García brought a further complaint against the State before the Administrative Tribunal of Norte de Santander, thereby availing himself of another remedy; at the time of writing a decision by the Tribunal is imminent. These remedies have not therefore been unreasonably prolonged, as the Committee maintains, since, in the circumstances of the case, they have been used in the most appropriate and effective way. The appropriateness of a remedy means its suitability within the domestic legal system to protect the legal situation that has been violated. The remedy is designed to produce a result and cannot be interpreted as not having produced a result or as having produced a result that is clearly absurd or irrational. There was no intention on the part of the competent authorities to prolong the inquiries, but any lack of thoroughness would certainly have led to absurd and illogical decisions.

8.9 The State party reiterates that Mr. Rojas García had not exhausted internal remedies at the time he submitted has case for the Committee's consideration and the communication should thus be inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

9.1 The observations of the State party on the merits of the case were transmitted to the author, who, by submission of 14 March 2000, refutes a number of the State's arguments. He repeats, for example, that a family with no previous dealings whatsoever with the justice system was the victim of a raid and its members ill-treated. He states that the raid was carried out on the assumption that criminals were to be found on the premises and, when children and old people were found, instead of correcting the mistake, all that has been done to date is compound it.

9.2 According to the author, article 343 of the Code of Criminal Procedure could not be applied in a case involving the home of an innocent family, without first complying with the most basic legal provisions covering such cases. Forcible entry through the roof at 2 a.m. and the firing of a gunshot constituted violations of the right to life, family life and other rights and freedoms guaranteed by the Constitution of Colombia.

9.3 The author rejects the Government's argument to the effect that the longer an inquiry takes, the less absurd and illogical the decisions will be. The author reiterates that more than seven years have passed since the events occurred and the case has still not been resolved.

9.4 The author adds that arbitrary cases arising out of the excessive use of force should automatically be given special treatment and examined and adjudicated by international bodies of inquiry in order to reserve impartiality and due process.

9.5 By submission of 10 July 2000, the author reports that, in respect of his suit against the State for reparation for the raid on his house, in the Administrative Tribunal of Norte de Santander, the Tribunal denied his petition, on the grounds of lack of evidence and on a strict interpretation of article 343 of the Code of Criminal Procedure. He reports that an appeal has been lodged with the Council of State in Bogotá.

9.6 He also reiterates that, according to eyewitnesses, the search party was making for house No. 2-36 and not 2-44 (the Rojas García house). He also points out that the widow of Ciro Alonso Colmenares (Mayor of Bochalema, whose murder gave rise to the investigation and the subsequent raid on the Rojas family's house), assured him that she never made any allegations against them. As for the gunshot fired by Gabriel Ruiz Jiménez, he alleges that it was not accidental but occurred inside the house in order to compel the occupants to find the keys to the door to the street. He also states that, when they realized that an official of the Pamplona public prosecutor's office, Cecilia Rojas García, lived in the house, the assailants' attitude changed and some of them apologized and said there had been a mistake.

9.7 With regard to his sister's death some months after the raid, the author claims that the authorities did not make the necessary effort to show a causal link between the raid and her death.

Examination of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee has noted the State party's claim that the author had not exhausted domestic remedies at the time the communication was submitted to the Committee and that the communication should therefore not have been admitted. It also notes that, according to the State party, it was not the intention of the competent authorities to prolong the investigations, but any lack of thoroughness would have led to absurd and illogical decisions. The Committee refers to what was stated in its decision on admissibility in this connection.

10.3 The Committee must first determine whether the specific circumstances of the raid on the Rojas García family's house (hooded men entering through the roof at 2 a.m.) constitute a violation of article 17 of the Covenant. By submission of 28 December 1999, the State party reiterates that the raid on the Rojas García family's house was carried out according to the letter of the law, in accordance with article 343 of the Code of Criminal Procedure. The Committee does not enter into the question of the legality of the raid; however, it considers that, under article 17 of the Covenant, it is necessary for any interference in the home not only to be lawful, but also not to be arbitrary. The Committee considers, in accordance with its General Comment No. 16 (HRI/GEN/1/Rev.4 of 7 February 2000) that the concept of arbitrariness in article 17 is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. It further considers that the State party's arguments fail to justify the conduct described. Consequently, the Committee concludes that there has been a violation of article 17, paragraph 1, insofar as there was arbitrary interference in the home of the Rojas García family.

10.4 In view of the fact that the Committee has found a violation of article 17 in respect of the arbitrariness of the raid on the author's house, it does not consider it necessary to decide whether the raid constituted an attack on the family's honour and reputation.

10.5 With regard to the alleged violation of article 7 of the Covenant, the Committee notes that the treatment received by the Rojas García family at the hands of the police, as described in paragraph 2.1 above, has not been refuted by the State party. The Committee therefore decides that there has been a violation of article 7 of the Covenant in this case.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by the State party of article 7 and article 17, paragraph 1, of the International Covenant on Civil and Political Rights in respect of the Rojas García family.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Rafael A. Rojas García and his family with an effective remedy, which must include reparation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion of Committee members Nisuke Ando and Ivan A. Shearer

We share the Committee's conclusion that there has been a violation of article 17, paragraph 1, insofar as there was arbitrary interference in the home of the Rojas García family. However, we are unable to share its conclusion that there has been a violation of article 7 in the present case (paras. 10.3 and 10.5).

According to the Committee (majority views), the treatment received by the Rojas García family at the hands of the police as described in paragraph 2.1, which has not been refuted by the State party, constitutes a violation of article 7. Paragraph 2.1 states that on 5 January 1993 at 2 a.m. a group of armed men, wearing civilian clothes, from the Public Prosecutor's office, forcibly entered the author's house through the roof; that the group carried out a room-by-room search of the premises, terrifying and verbally abusing the members of the author's family, including small children; and that one of the officials fired a gunshot in the course of the search.

As the author himself states, the search party apparently hit the wrong house (No. 2-44 instead of No. 2-36) and when they realized that an official of the local prosecutor's office lived in the house, some of the party's members apologized and said that there had been a mistake (para. 9.6). The author also states that the raid was carried out on the assumption that criminals were to be found on the premises but that, after the incident, the prosecutor's office failed to correct the mistake, thus compounding the case (para. 9.1).

To our mind, the search party must have expected strong resistance, even by firearms, from the house because they had assumed that the murderer or murderers of the mayor were hiding in it. This would explain what is described in paragraph 2.1: the forcible entry into the house through the roof in the middle of the night; the subsequent room-by-room search of the premises with probably harsh words by the searchers; and an accidental gunshot by one of them. Certainly, there was a mistake on the part of the prosecutor's office, but it is doubtful if the search party's conduct based on that mistake could be characterized as a violation of article 7.

In our view, the search party had been acting in good faith until they realized that they had hit a wrong target. The State party maintains that the raid of the author's house was in compliance with the law. The State party also asserts that the director of the local investigating office opened a preliminary inquiry into the gunshot and considered it not as misconduct but as an accident (para. 8.3). Under the circumstances we conclude that the search party had not intent to terrify the author's family.

Ordinarily article 7 requires an intent on the part of an actor as to possible effects of his/her act, and the lack of such intent works to eliminate or extenuate unlawfulness of the act. This holds true for police investigations such as the one in the present case. Therefore, in our view, there has been no violation of article 7 in this case.

(Signed) Nisuke Ando

(Signed) Ivan A. Shearer

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

E. Communication No. 727/1996, Paraga v. Croatia (Views adopted on 4 April 2001, seventy-first session)*

Submitted by: Mr. Dobroslav Paraga

Alleged victim: The author

State party: Croatia

Date of communication: 16 April 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 2001,

Having concluded its consideration of communication No. 727/1996 submitted to the Human Rights Committee by Mr. Dobroslav Paraga, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 16 April 1996, is Dobroslav Paraga, a Croatian citizen residing in Zagreb. He claims to be a victim of violations by Croatia of articles 2, paragraph 3, 9, paragraphs 1 and 5, 7, 12, paragraph 2, 14, paragraphs 2 and 7, 19, paragraphs 1 and 2, 25 and 26 of the International Covenant on Civil and Political Rights. The Covenant entered into force for Croatia on 8 October 1991; the Optional Protocol entered into force for Croatia on 12 January 1996. He is not represented by Counsel.

The facts and claims as submitted by the author

2.1 The author notes that he has been a human rights activist throughout his life, and that he was imprisoned, tortured and was the subject of political trials in the former Yugoslavia. In 1990, he reorganized the Croatian Party of Rights ("HSP"), which had been banned since 1929. He then became the president of the HSP.

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* The following members of the Committee participated in the examination of the case: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfic Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.2 According to the author, following the disintegration of the former Yugoslavia, the new Croatian State has similarly subjected him to persecution and to numerous repressive measures, such as unlawful arrests, false declarations, political trials, unjustified arrest warrants, etc.

2.3 On 21 September 1991, the vice-president of the HSP, Ante Paradzik, was murdered after attending a political rally. The author contends that the attack had also targeted him, and that it was by pure chance that he had not been in the car with his colleague. In 1993, four officials of the Ministry of Internal Affairs were convicted of the murder; they were reportedly released in 1995.

2.4 On 22 November 1991, Mr. Paraga was arrested after a police ambush, on charges of planning to overthrow the Government. He was kept in detention until 18 December 1991, when his release was ordered after the High Court found that there was insufficient evidence in support of the charge. The author alleges a violation of article 9, paragraph 1 and 5, in this connection. He also claims that the president of the High Court was dismissed from his functions after having ruled in his favour.

2.5 On 1 March 1992, an explosion occurred in the offices of the HSP in Vinkovci, where the author had expected to be. Several people died in the blast, but according to the author, no formal investigation has ever taken place. On 21 April 1992, the author was summoned for having called the President of the Republic a dictator. Mr. Paraga claims that these events constitute a violation of article 19 of the Covenant, since the measures against him were aimed at restricting his freedom of expression.

2.6 On 2 June 1992, Mr. Paraga states that he was charged with "illegal mobilization of persons into an army". He claims that this charge was designed to prevent him from participating in an election campaign for Parliament and to run for election for the Presidency of the Republic. To the author, this was in violation of article 25 of the Covenant, since he was effectively prevented from being a candidate in the elections. Moreover, he argues that the elections were rigged.

2.7 On 30 September 1992, the public prosecutor filed an action in the Constitutional Court, with a view to obtaining a declaration banning the HSP. On 8 November 1992, a military court in Zagreb initiated an investigation against the HSP for conspiracy to overthrow the Government. For the author, this action constituted a violation of article 14, paragraph 7, since he had already been acquitted on this charge in 1991. His parliamentary immunity was withdrawn for 13 months. On 4 November 1993, the military court dismissed the charges against the author.

2.8 After a trip to the United States during which the author had called the President of the Republic an oppressor, he was charged with slander on 3 June 1993. Parliament stripped the author of his function as vice-chairman of the parliamentary committee on human and ethnic rights. The author claims that a member of the secret police admitted in a statement printed by a weekly newspaper in July 1993 that he had received an order to assassinate the author.

2.9 On 28 September 1993, the ministry of registrations cancelled the author's right to represent the HSP and, according to the author, granted it to an agent who represented the Government, thereby making the HSP a simple extension of the ruling party. The author's complaints to the Court of Registrars and to the Constitutional Court were rejected.

2.10 In the parliamentary elections of October 1995, the author participated with a new party, the "Croatian Party of Rights - 1861", but failed to secure re-election. He argues that because of the sanctions against him, he could not compete fairly in the election, in violation of article 25 of the Covenant. According to the author, the Polling Committee violated the Election Law which allowed the HSP (then led by a Government agent) to enter Parliament although it had not obtained the required 5 per cent of the total vote. The author and leaders of 10 other political parties filed an objection, which the Constitutional Court dismissed on 20 November 1995.

2.11 The author notes that attacks on his person continue. He refers to a court order dated 31 January 1995, which was confirmed on 25 March 1996, that he must vacate the office premises he occupies. To him, this was done to obstruct him in his political activities. He further notes that his political party was elected as part of the coalition Government in the County Government of Zagreb, but that the President of the Republic did not accept the results of the election and blocked the appointment of a mayor.

State party's observations on admissibility and author's comments

3.1 In comments dated 31 October 1997, the State party recalls that when acceding to the Optional Protocol, it made the following declaration which limits the competence ratione temporis of the Committee to examine communications: "The Republic of Croatia interprets article 1 of this Protocol as giving the Committee the competence to receive and consider communications from individuals subject to the jurisdiction of the Republic of Croatia who claim to be victims of a violation by the Republic of any rights set forth in the Covenant which results either from acts, omissions or events occurring after the date on which the Protocol entered into force for the Republic of Croatia." For the State party, the author's allegations relate almost exclusively to events and acts which occurred well before the Protocol entered into force for Croatia on 12 January 1996.

3.2 For the State party, the alleged violations cannot be taken as a continuing process which, together, constitute a separate and continuing violation of the author's Covenant rights. Moreover, some of the judicial procedures referred to by the applicant were resolved in his favour, such as the proceedings related to the ban of the HSP, which the public prosecutor decided to discontinue. That the author was involved in a number of judicial procedures over the years does not prove that these procedures were mutually inter-related, nor does it generate the continuing effect the procedures may have had on the enjoyment of the author's rights.

3.3 It is conceded that an exception to the above observations is the court order issued against Mr. Paraga to vacate the premises he and his party occupy, which was confirmed on 25 March 1996, i.e. after the entry into force of the Optional Protocol for Croatia. However, the State party argues that as Mr. Paraga does not claim a violation of article 26 in this regard but a violation of his right to property, which is not protected by the Covenant, this part of the communication is inadmissible ratione materiae. Besides, the State party notes, the Constitutional Court of Croatia can address both the prohibition of discrimination on the basis of political opinion and the protection of property, in the context of the protection of fundamental rights and freedoms guaranteed by the Constitution. As this avenue was not used by the author in respect of this allegation, available domestic remedies have not been exhausted.

3.4 Thus, the State party considers the communication to be inadmissible partly on account of its declaration ratione temporis and, partly because of non-exhaustion of domestic remedies.

4.1 In his comments, the author contends that all the consequences, legal or otherwise, of actions taken against him by the Croatian authorities have had continuing effects. He reiterates that:

(a) The murder of his former deputy and vice-president of the HSP, Ante Paradzik, was never completely solved. After the second trial of four members of the Interior Ministry, the perpetrators of the crime were pardoned, and the judge who had sentenced them for conspiracy lost his job;

(b) The legal action initiated against the author which led to his arrest on 22 November 1991 and which resulted in his release for lack of evidence was never formally finalized, so that the author cannot initiate an action for compensation for unlawful arrest and unlawful detention;

(c) The procedure against the author initiated on 21 April 1992 for the offence of slander has not been terminated;

(d) No fair and impartial investigation into the bombing of the headquarters of his party on 1 March 1992 in Vinkovci was ever conducted;

(e) No impartial investigation into the alleged rigging of the elections of 2 August 1992 was carried out;

(f) No investigation into the alleged assassination scheme against the author in March 1993, claimed to have been plotted by members of the Government, was ever carried out;

(g) and finally, after the author was stripped of the leadership of the HSP, his (former) party was turned into a "satellite" of the ruling party.

4.2 The author affirms that he is a victim of a violation of article 26, on the grounds that he has been discriminated against because of his political opinions. On 7 October 1997, the County Court of Zagreb initiated proceedings against the author on the basis of article 191 of the Criminal Code of Croatia, for spreading false information; the author notes that he may be sentenced to six months' imprisonment if found guilty. On 4 December 1997, the author was arrested at the Austrian border, allegedly after misinformation about the purpose of the author's visit had wilfully been given to the Austrian authorities by the Croatian Ministry of Foreign

Affairs - the author was kept 16 hours in Austrian detention. A similar event had already occurred on the occasion of a visit by the author to Canada, when he was kept detained for six days in Toronto in June 1996, allegedly because the Croatian Government had accused him of subversive activities.

4.3 The author rejects as incorrect the Government's argument that the legal procedures related to the evacuation and dispossession of the flat used as an office of the author's political party had nothing to do with discrimination on the basis of political opinion. Rather, he asserts, it was only because of international public pressure and due to the intervention of the flat's owner, who has dual (Croatian/Canadian) citizenship, that the court decision of 25 March 1996 was not enforced.

4.4 As to the possibility of having the Constitutional Court rule on claims of unlawful discrimination and illegal expropriation and violations of other fundamental rights, the author contends that the Court "is an instrument of the governing oligarchy and that [on] essential matters, the decisions of ... President Tudjman" are not questioned. Therefore, such constitutional remedies are said to be ineffective, and the author argues that in respect of all the above issues and claims, he has exhausted domestic remedies.

Admissibility considerations

5.1 During its sixty-third session, the Committee considered the admissibility of the communication.

5.2 The Committee recalled that upon acceding to the Optional Protocol, the State party entered a declaration restricting the Committee's competence to events following the entry into force of the Optional Protocol for Croatia on 12 January 1996. The Committee noted that most of the alleged violations of Mr. Paraga's rights under the Covenant result from a series of acts and events which occurred between 1991 and 1995 and thus precede the date of entry into force of the Optional Protocol for Croatia.

5.3 The Committee considered, however, that the author's claims that he cannot initiate an action for compensation for his allegedly unlawful arrest and detention of 22 November 1991, since the proceedings have never been formally finalized, as well as his claim that the procedure initiated against him on 21 April 1992 for slander has never been terminated, relate to incidents that have continuing effects which *in themselves* may constitute a violation of the Covenant. The Committee considered therefore that these claims were admissible and should be examined on the merits.

5.4 The Committee considered that it was precluded ratione temporis, in light of the declaration made by the State party upon accession to the Optional Protocol, from considering the remainder of the communication insofar as it related to events which occurred before 12 January 1996, since the continuing effects claimed by Mr. Paraga did not appear to constitute *in themselves* a violation of the Covenant, nor could they be interpreted as an affirmation, by act or clear implication, of the alleged previous violations of the State party.[1]

5.5 In relation to the court order ordering the author to vacate the apartment he uses as an office of his political party, the Committee noted the State party's argument that complaints about unlawful and arbitrary dispossession of property and unlawful discrimination may be adjudicated by the Constitutional Court. The author merely contended that this remedy is not effective, as the Constitutional Court is "an instrument of the governing oligarchy". The Committee recalled that mere doubts about the effectiveness of domestic remedies do not absolve a complainant from resorting to them; the Committee noted in this context that in respect of other alleged violations of his rights, Croatian tribunals had ruled in the author's favour in the past. In the circumstances, the Committee concluded that recourse to the Constitutional Court in relation to the order to vacate the apartment used as office premises by the author would not be a priori futile. Accordingly, the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met in this respect.

5.6 With regard to the author's claim that he is a victim of a violation of article 26, referred to in paragraph 4.2 above, the Committee considered that this claim was admissible and should be examined on its merits.

6. Accordingly, on 24 July 1998, the Human Rights Committee decided that the communication was admissible insofar as it related to the author's arrest and detention on 22 November 1991, the slander proceedings initiated against him on 21 April 1992, and his claim that he was a victim of discrimination.

The State party's information and the author's reply on the merits of the communication

7.1 In its submission on the merits, the State party provides further information on the proceedings involving the author's arrest and detention in November 1991, and on the charges of "dissemination of false information" of April 1992, and confirms that proceedings with respect to all related charges have now been terminated.

7.2 The State party confirms that Mr. Paraga was arrested on 22 November 1991, that his detention was ordered by the investigating judge with reference to articles 191, paragraph 2, points 2 and 3 of the Criminal Procedures Act, and that he was released on 18 December 1991, by the Zagreb County Court.

7.3 The State party states that on 25 November 1991 the Zagreb County Public Attorney's Office filed a request under No. KT - 566/91 to initiate an investigation against Mr. Paraga on charges of "armed rebellion" and charges of "illegal possession of weapons and explosives", pursuant to article 236 (f), paragraphs 1 and 2, and article 209, paragraphs 2 and 3, respectively, of the Croatian Penal Code, which was in force at the time. A request for custody was also made under article 191, paragraph 2, points 2 and 3 of the Criminal Procedures Act.

7.4 The investigating judge rejected the request to conduct an investigation and delivered the case to a panel of judges who decided to conduct an investigation with respect to article 209, paragraphs 2 and 3 only. However, the County Public Attorney's Office failed to issue an indictment, and did not ask the investigating judge to proceed with the investigation. Therefore, the investigating judge forwarded the file to the panel of three judges again, who decided to discontinue further proceedings against Mr. Paraga, pursuant to article 162, paragraph 1, point 3, of the Criminal Procedures Act, in a decision dated No. Kv-48/98 of 10 June 1998. According to the State party, the decision was sent to Mr. Paraga on 17 June 1998 and received by him on 19 June 1998.

7.5 The State party claims that Mr. Paraga's arrest was conducted legally, in accordance with the Criminal Procedures Act in force at the time and that, therefore, the Republic of Croatia did not violate article 9, paragraph 1, of the Covenant. Moreover, the State party notes that since the procedure has been terminated the author may take an action for compensation before the Croatian courts, in accordance with article 9, paragraph 5, of the Covenant.

7.6 The State party confirms that proceedings were instituted by the Municipal Public Attorney's Office, in April 1992, for "dissemination of false information", under article 191 of the Penal Code (article 197, paragraph 1, of the earlier Code), pursuant to article 425, paragraph 1, with reference to article 260, paragraph 1, point 1 of the Criminal Proceedings Act. (See further below). The State party states that due to amendments made to the respective provisions of the Penal Code, and the passage of time, the Split Municipal Court, who had received the indictment from the Public Attorney's office, dismissed the charges against Mr. Paragon in a decision, No. IK-504/92, issued on 26 January 1999.

7.7 As for the alleged discrimination due to the author's political views, especially after his interviews with Novi list daily, the State party confirms that the Zagreb Municipal Public Attorney's Office instituted proceedings against Mr. Paraga on 7 October 1997, for "dissemination of false information", pursuant to article 191 of the Penal Code in force at that time. However, upon completion of the ensuing inquiry, the criminal proceedings were dismissed on 26 January 1998.

7.8 The State party explains, that the dissemination of false information, pursuant to the then applicable article 191 of the Penal Code, could have been "committed by a person who transmits or spreads news or information known by the person to be false, and likely to disturb a greater number of citizens, and also intended to cause such disturbance." Under the new Penal Code, in force since 1 January 1998, the same criminal offence is now referred to as "dissemination of false and disturbing rumours" (article 322 of the Penal Code) and to be convicted thereon "the perpetrator must know that the rumours he/she spreads are false, his/her purpose is to disturb a greater number of citizens, and a greater number of citizens are disturbed." What is required, therefore, is that the effect corresponds with the intent. According to the State party, as this was not the case in this instance, the criminal charges were dropped and proceedings against Mr. Paraga were terminated on 26 January 1998.

7.9 Regarding the author's allegation that he was arrested and detained on the Austrian border on 4 December 1997 and on the Canadian border in June 1996, on the basis of false information given earlier by the Croatian Ministry of Foreign Affairs about the purpose of his travel, the Croatian Ministry of Foreign Affairs strongly reject such allegations as malicious and entirely unfounded. According to the State party, the Croatian Embassy in Vienna requested and received an official explanation from the Austrian authorities about Mr. Paraga's detention which, it claims, was only brought to its attention by the Austrian press. The State party was informed that Mr. Paraga had entered Austria as a Slovenian citizen, and was detained until certain facts were established on why Mr. Paraga had been denied entry to Austria back in 1995. It was also informed that a complaint filed by Mr. Paraga himself against his detention was still being processed. The State party claims that as Mr. Paraga had not notified the Croatian diplomatic mission of the incident, it was not possible to protect him under the international conventions.

7.10 Similarly, the State party claims that it was only informed by the press of Mr. Paraga's detention by the Canadian Immigration Office in Toronto and that on becoming aware of his detention, the Consul General of the Republic of Croatia in Mississauga contacted Mr. Paraga's attorney who refused to give him any information. The Consul General then attempted to contact Mr. Henry Ciszek, supervisor of the Canadian Immigration Office at Toronto Airport, who informed him that Mr. Paraga travelled with a Slovenian passport (his Croatian passport did not have a valid Canadian visa), and that he refused consular protection by refusing to speak to the Consul General.

8.1 The author rejects the State party's submissions on the merits as "completely untrue". With respect to his arrest and detention in November 1991, the author claims that he was arrested "without charge" and arrested and detained "arbitrarily and absolutely without basis" for political reasons only. The author alleges that the President of the Republic of Croatia exerted pressure on the then president of the Supreme Court to sentence him "illegally" and that when he refused to do so, he was dismissed from his position as the President of the Supreme Court on 24 December 1991.[2]

8.2 The author confirms that the court decision terminating these proceedings against him was issued on 10 June 1998. However, he states that this was only issued after he had filed a communication with the Human Rights Committee, and after filing a fourth "rush note" for termination of the procedure, with the County Court of Zagreb. In addition, the author states that at least from 1991 to 1998 he was under criminal investigation and that this deprived him of his civil and political rights as "person under investigation cannot have any permanent job, he is not allowed to use social and health care or to be employed".

8.3 With regard to the charges initiated against Mr. Paragon in April 1992 for slander, the author concedes that these charges were terminated but contends that this took seven years from the date he was charged.

8.4 In relation to the charges made on 7 October 1997 for the dissemination of false information the author contends that, despite the State party's claim to the contrary, these proceedings have not yet been finalized. The author states that he has not received any decision on the termination of these proceedings. The author reiterates his belief that his arrest by border guards in Canada in 1996 and in Austria in 1997 resulted from the Croatian authorities information to the border controls of both countries that the author was involved in subversive activities. In fact, the author claims that he was informed of such by both the Canadian and Austrian immigration authorities. He refutes the State party's contention that they were prepared to offer him help during his detention in Canada and Austria and claims that on neither occasion did the Croatian authorities assist to have him released. The author claims that he lodged a complaint against the Government of Croatia for compensation for damages after his detention in Canada and Austria for what he refers to as "misuse of power".

Reconsideration of the admissibility decision and examination of the merits

9.1 The Human Rights Committee has examined the communication in light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.[3]

9.3 With respect to the author's alleged unlawful arrest and detention of 22 November 1991 the Committee decided, in its admissibility decision of 24 July 1998, that the communication was admissible insofar as it related to the continuing effects of the criminal proceedings, which were instituted against the author at this time and were still pending at the time of the submission of the communication. The Committee recalls that its decision on admissibility was predicated on the alleged continuing effects of violations that are said to have occurred prior to the entry into force of the Optional Protocol for Croatia.

9.4 The Committee notes the State party's contention that these proceedings were terminated on 17 June 1998, and its contention that the author can now file a claim for compensation in the domestic courts. Given this new information provided since the decision on admissibility, the Committee reviews its previous decision on admissibility, in accordance with rule 93 (4) of its rules of procedure, and declares that the claims relating to an alleged violation of article 9, paragraph 5, is inadmissible because of the authors failure to exhaust domestic remedies in this respect under article 5, paragraph 2 (b) of the Optional Protocol. The author should avail himself of domestic remedies in this regard.

9.5 The Committee proceeds without delay to the consideration of the merits of the claim with respect to the slander proceedings and the alleged discrimination.

9.6 In relation to the slander proceedings, the Committee has noted the author's contention that proceedings were instituted against him because he referred to the President of the Republic as a dictator. While the State party has not refuted that the author was indeed charged for this reason, it has informed the Committee that the charges against the author were finally dismissed by the court in January 1999. The Committee observes that a provision in the Penal Code under which such proceedings could be instituted may, in certain circumstances, lead to restrictions that go beyond those permissible under article 19, paragraph 3 of the Government. However, given the absence of specific information provided by the author and the further fact of the dismissal of the charges against the author, the Committee is unable to conclude that the institution of proceedings against the author, by itself, amounted to a violation of article 19 of the Covenant.

9.7 The Committee observes, that the charges brought against Mr. Paraga in November 1991 and the slander charges brought against him in April 1992 raise the issue of undue delay (article 14, paragraph 3 (c) of the Covenant). The Committee is of the view that this issue is admissible as the proceedings were not terminated until two and a half years and three years, respectively, after the entry into force of the Optional Protocol in respect of the State party. The Committee notes that both procedures took seven years altogether to be finalized, and observes that the State party, although it has provided information on the course of the proceedings, has not given any explanation on why the procedures in relation to these charges took so long and has provided no special reasons that could justify the delay. The Committee considers, therefore, that the author was not given a trial "without undue delay", within the meaning of article 14, paragraph 3 (c) of the Covenant.

9.8 As to the author's claim that he is a victim of discrimination because of his political opposition to the then Government of Croatia, the Committee notes that the proceedings which were instituted against the author on 7 October 1997 were dismissed, a few months later, on 26 January 1998. In view of this fact, and lacking any further information that would substantiate this claim, the Committee cannot find a violation of any of the articles of the Covenant in this regard.

9.9 With regard to the author's allegation that he was subjected to defamation by the Croatian authorities in Austria and Canada, the Committee notes that the State party has stated that in neither case did the author inform the Croatian authorities of his detention and that with respect to his entry into Canada he was travelling on a Slovenian passport. The Committee notes that the author has not further commented on these points. Therefore, the Committee concludes that the author has not substantiated his claim and considers that there has been no violation in this respect.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Croatia of article 14, paragraph 3 (c).

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an effective remedy, including appropriate compensation.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] See the Committee's Views on communication No. 516/1992 (Simunek et al. v. Czech Republic), adopted 19 July 1995, para. 4.5.

[2] The author does not provide any details that may substantiate this claim.

[3] It is noted that the claimant registered two communications with the European Court of Human Rights in 1999, however, the issues raised therein differ from those raised in this communication.

F. Communication No. 736/1997, Ross v. Canada
(Views adopted on 18 October 2000, seventieth session)*

Submitted by:	Malcolm Ross (represented by Douglas H. Christie, legal counsel)
Alleged victim:	The author
State party:	Canada
Date of communication:	1 May 1996
Prior decisions:	Special Rapporteur's rule 91 decision, transmitted to the State party on 20 January 1997 (not issued in document form)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 October 2000,

Having concluded its consideration of communication No. 736/1997 submitted to the Human Rights Committee by Malcolm Ross under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Malcolm Ross, a Canadian citizen. He claims to be a victim of a violation by Canada of articles 18 and 19 of the Covenant. He is represented by counsel, Mr. Douglas H. Christie.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia.

Under rule 85 of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in the examination of the case.

The text of an individual opinion by one Committee member is appended to the present document.

The facts as submitted by the author

2.1 The author worked as a modified resource teacher for remedial reading in a school district of New Brunswick from September 1976 to September 1991. Throughout this period, he published several books and pamphlets and made other public statements, including a television interview, reflecting controversial, allegedly religious opinions. His books concerned abortion, conflicts between Judaism and Christianity, and the defence of the Christian religion. Local media coverage of his writings contributed to his ideas gaining notoriety in the community. The author emphasizes that his publications were not contrary to Canadian law and that he was never prosecuted for the expression of his opinions. Furthermore, all writings were produced in his own time, and his opinions never formed part of his teaching.

2.2 Following expressed concern, the author's in-class teaching was monitored from 1979 onwards. Controversy around the author grew and, as a result of publicly expressed concern, the School Board on 16 March 1988, reprimanded the author and warned him that continued public discussion of his views could lead to further disciplinary action, including dismissal. He was, however, allowed to continue to teach, and this disciplinary action was removed from his file in September 1989. On 21 November 1989, the author made a television appearance and was again reprimanded by the School Board on 30 November 1989.

2.3 On 21 April 1988, a Mr. David Attis, a Jewish parent, whose children attended another school within the same School District, filed a complaint with the Human Rights Commission of New Brunswick, alleging that the School Board, by failing to take action against the author, condoned his anti-Jewish views and breached section 5 of the Human Rights Act by discriminating against Jewish and other minority students. This complaint ultimately led to the sanctions set out in paragraph 4.3 below.

Relevant domestic procedures and legislation

3.1 As a result of its federal structure, Canada's human rights law is bifurcated between the federal and the provincial jurisdictions. Each province, as well as the federal and territorial jurisdictions, has enacted human rights legislation. The details of the different legislative regimes may differ, but their overall structure and contour are similar.

3.2 According to the State party, the human rights codes protect Canadian citizens and residents from discrimination in numerous areas, including employment, accommodation and services provided to the public. Any individual claiming to be a victim of discrimination may file a complaint with the relevant human rights commission, which will in turn inquire into the complaint. The burden of proof to be met by the complainant is the civil standard based on a balance of probabilities, and the complainant need not show that the individual intended to discriminate. A tribunal appointed to inquire into a complaint has the authority to impose a wide range of remedial orders, but has no authority to impose penal sanctions. Individuals concerned about speech that denigrates particular minorities may choose to file a complaint with a human rights commission rather than or in addition to filing a complaint with the police.

3.3 The complaint against the School Board was lodged under section 5 (1) of the New Brunswick Human Rights Code. This section reads:

> "No person, directly or indirectly, alone or with another, by himself or by the interpretation of another, shall
>
> (a) deny to any person or class of persons with respect to any accommodation, services or facilities available to the public, or
>
> (b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public,
>
> because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex."

3.4 In his complaint, Mr. Attis submitted that the School Board had violated section 5 by providing educational services to the public which discriminated on the basis of religion and ancestry in that they failed to take adequate measures to deal with the author. Under section 20 (1) of the same Act, if unable to effect a settlement of the matter, the Human Rights Commission may appoint a board of inquiry composed of one or more persons to hold an inquiry. The board appointed to examine the complaint against the School Board made its orders pursuant to section 20 (6.2) of the same Act, which reads:

> "Where, at the conclusion of an inquiry, the Board finds, on a balance of probabilities, that a violation of this Act has occurred, it may order any party found to have violated the Act:
>
> (a) to do, or refrain from doing, any act or acts so as to effect compliance with the Act,
>
> (b) to rectify any harm caused by the violation,
>
> (c) to restore any party adversely affected by the violation to the position he would have been in but for the violation,
>
> (d) to reinstate any party who has been removed from a position of employment in violation of the Act,
>
> (e) to compensate any party adversely affected by the violation for any consequent expenditure, financial loss or deprivation of benefit, in such amount as the Board considers just and appropriate, and
>
> (f) to compensate any party adversely affected by the violation for any consequent emotional suffering, including that resulting from injury to dignity, feeling or self-respect, in such amount as the Board considers just and appropriate."

3.5 Since 1982, the *Canadian Charter of Rights and Freedoms* ("the Charter") has been part of the Canadian Constitution, and consequently any law that is inconsistent with its provisions is, to the extent of that inconsistency, of no force or effect. The Charter applies to the federal, provincial and territorial governments in Canada, with respect to all actions of those governments, whether they be legislative, executive or administrative. Provincial human rights codes and any orders made pursuant to such codes are subject to review under the Charter. The limitation of a Charter right may be justified under section 1 of the Charter, if the Government can demonstrate that the limitation is prescribed by law and is justified in a free and democratic society. Sections 1, 2 (a) and 2 (b) of the Charter provide:

> "1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ..."

3.6 There are also several other legislative mechanisms both at the federal and provincial level to deal with expressions that denigrate particular groups in Canadian society. For example, the Criminal Code prohibits advocating genocide, the public incitement of hatred and the wilful promotion of hatred. The consent of the Attorney-General is required to commence a prosecution with respect to these offences. The burden of proof on the Crown is to demonstrate that the accused is guilty beyond a reasonable doubt and the Crown must prove all the requisite elements of the offence, including that the accused possessed the requisite mens rea.

The procedure before the domestic tribunals

4.1 On 1 September 1988, a Human Rights Board of Inquiry was established to investigate the complaint. In December 1990 and continuing until the spring of 1991, the first hearing was held before the Board. All parties were represented at the hearing and, according to the State party, were given full opportunity to present evidence and make representations. There were in total 22 days of hearing, and testimony was given by 11 witnesses. The Board found that there was no evidence of any classroom activity by the author on which to base a complaint of discrimination. However, the Board of Inquiry also noted that

> "... a teacher's off-duty conduct can impact on his or her assigned duties and thus is a relevant consideration ... An important factor to consider, in determining if the Complainant has been discriminated against by Mr. Malcolm Ross and the School Board, is the fact that teachers are role models for students whether a student is in a particular teacher's class or not. In addition to merely conveying curriculum information to children in the classroom, teachers play a much broader role in influencing children through their general demeanour in the classroom and through their off-duty lifestyle. This role model influence on students means that a teacher's off-duty conduct can fall

> within the scope of the employment relationship. While there is a reluctance to impose restrictions on the freedom of employees to live their independent lives when on their own time, the right to discipline employees for conduct while off-duty, when that conduct can be shown to have a negative influence on the employer's operation has been well established in legal precedent."

4.2 In its assessment of the author's off-duty activities and their impact, the Board of Inquiry made reference to four published books or pamphlets entitled respectively *Web of Deceit*, *The Real Holocaust*, *Spectre of Power* and *Christianity v. Judeo-Christianity*, as well as to a letter to the editor of *The Miramichi Leader* dated 22 October 1986 and a local television interview given in 1989. The Board of Inquiry stated, inter alia, that it had

> "... no hesitation in concluding that there are many references in these published writings and comments by Malcolm Ross which are prima facie discriminatory against persons of the Jewish faith and ancestry. It would be an impossible task to list every prejudicial view or discriminatory comment contained in his writings as they are innumerable and permeate his writings. These comments denigrate the faith and beliefs of Jews and call upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. Malcolm Ross identifies Judaism as the enemy and calls on all Christians to join the battle.
>
> Malcolm Ross has used the technique in his writings of quoting other authors who have made derogatory comments about Jews and Judaism. He intertwines these derogatory quotes with his own comments in a way such that he must reasonably be seen as adopting the views expressed in them as his own. Throughout his books, Malcolm Ross continuously alleges that the Christian faith and way of life are under attack by an international conspiracy in which the leaders of Jewry are prominent.
>
> ... The writings and comments of Malcolm Ross cannot be categorized as falling within the scope of scholarly discussion which might remove them from the scope of section 5 [of the Human Rights Act]. The materials are not expressed in a fashion that objectively summarizes findings and conclusions or propositions. While the writings may have involved some substantial research, Malcolm Ross' primary purpose is clearly to attack the truthfulness, integrity, dignity and motives of Jewish persons rather than the presentation of scholarly research."

4.3 The Board of Inquiry heard evidence from two students from the school district who described the educational community in detail. Inter alia, they gave evidence of repeated and continual harassment in the form of derogatory name calling of Jewish students, carving of swastikas into desks of Jewish children, drawing of swastikas on blackboards and general intimidation of Jewish students. The Board of Inquiry found no direct evidence that the author's off-duty conduct had impacted on the school district, but found that it would be reasonable to anticipate that his writings were a factor influencing some discriminatory conduct by the students. In conclusion, the Board of Inquiry held that the public statements and writings of Malcolm Ross had continually over many years contributed to the creation of a "poisoned environment within School District 15 which has greatly interfered with the educational services provided to the Complainant and his children". Thus, the Board of Inquiry held that the School Board was vicariously liable for the discriminatory actions of its employee and that it was directly in violation of the Act due to its failure to discipline the author in a timely and appropriate manner, so endorsing his out-of-school activities and writings. Therefore, on 28 August 1991, the Board of Inquiry ordered

> "… (2) That the School Board
>
> (a) immediately place Malcolm Ross on a leave of absence without pay for a period of 18 months;
>
> (b) appoint Malcolm Ross a non-teaching position if, …, a non-teaching position becomes available in School District 15 for which Malcolm Ross is qualified; …
>
> (c) terminate his employment at the end of the 18 months' leave of absence without pay if, in the interim, he has not been offered and accepted a non-teaching position;
>
> (d) terminate Malcolm Ross' employment with the School Board immediately if, at any time during the eighteen month leave of absence or of at any time during his employment in a non-teaching position, he (i) publishes or writes for the purpose of publication, anything that mentions a Jewish or Zionist conspiracy, or attacks followers of the Jewish religion, or (ii) publishes, sells or distributes any of the following publications, directly or indirectly: *Web of Deceit, The Real Holocaust (The attack on unborn children and life itself), Spectre of Power, Christianity vs Judeo-Christianity (The battle for truth).*"

4.4 Pursuant to the Order, the School Board transferred the author to a non-classroom teaching position in the School District. The author applied for judicial review requesting that the order be removed and quashed. On 31 December 1991, Creaghan J. of the Court of Queen's Bench allowed the application in part, quashing clause 2 (d) of the order, on the ground that it was in excess of jurisdiction and violated section 2 of the Charter. As regards clauses (a), (b), and (c) of the order, the court found that they limited the author's Charter rights to freedom of religion and expression, but that they were saved under section 1 of the Charter.

4.5 The author appealed the decision of the Court of Queen's Bench to the Court of Appeal of New Brunswick. At the same time, Mr. Attis cross-appealed the Court's decision regarding section 2 (d) of the Order. The Court of Appeal allowed the author's appeal, quashing the order given by the Board of Inquiry, and accordingly rejected the cross-appeal. By judgement of 20 December 1993, the Court held that the order violated the author's rights under section 2 (a) and (b) of the Charter in that they penalized him for publicly expressing his sincerely held views by preventing him from continuing to teach. The Court considered that, since it was the author's activities outside the school that had attracted the complaint, and since it had never been suggested that he used his teaching position to further his religious views, the ordered remedy did not meet the test under section 1 of the Charter, i.e. it could not be deemed a specific purpose so pressing and substantial as to override the author's constitutional guarantee of freedom of expression. To find otherwise would, in the Court's view, have the effect of condoning the suppression of views that are not politically popular any given time. One judge, Ryan J.A., dissented and held that the author's appeal should have been dismissed and that the cross-appeal should have been allowed, with the result that section 2 (d) of the Order should have been reinstated.

4.6 Mr. Attis, the Human Rights Commission and the Canadian Jewish Congress then sought leave to appeal to the Supreme Court of Canada, which allowed the appeal and, by decision of 3 April 1996, reversed the judgement of the Court of Appeal, and restored clauses 2 (a), (b) and (c) of the order. In reaching its decision, the Supreme Court first found that the Board of Inquiry's finding of discrimination contrary to section 5 of the Human Rights Act on the part of the School Board was supported by the evidence and contained no error. With regard to the evidence of discrimination on the part of the School Board generally, and in particular as to the creation of a poisoned environment in the School District attributable to the conduct of the author, the Supreme Court held

> "... that a reasonable inference is sufficient in this case to support a finding that the continued employment of [the author] impaired the educational environment generally in creating a 'poisoned' environment characterized by a lack of equality and tolerance. [The author's] off-duty conduct impaired his ability to be impartial and impacted upon the educational environment in which he taught. (para. 49)
>
> ... The reason that it is possible to 'reasonably anticipate' the causal relationship in this appeal is because of the significant influence teachers exert on their students and the stature associated with the role of a teacher. It is thus necessary to remove [the author] from his teaching position to ensure that no influence of this kind is exerted by him upon his students and to ensure that educational services are discrimination free." (para. 101)

4.7 On the particular position and responsibilities of teachers and on the relevance of a teacher's off duty conduct, the Supreme Court further commented:

> "... Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public school system as a whole.
>
> ... By their conduct, teachers as 'medium' must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to 'choose which hat they will wear on what occasion'.
>
> ... It is on the basis of the position of trust and influence that we can hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to

> inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a 'poisoned' environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant." (paras. 43-45)

4.8 Secondly, the Court examined the validity of the impugned Order under the Canadian Constitution. In this regard, the Court first considered that the Order infringed sections 2 (a) and 2 (b) of the Charter as it in effect restricted respectively the author's freedom of religion and his freedom of expression. The Court went on to consider whether these infringements were justifiable under section 1 of the Charter, and found that the infringements had occurred with the aim of eradicating discrimination in the provision of educational services to the public, a "pressing and substantial" objective. The Court further found that the measures (a) (b) and (c) imposed by the order could withstand the proportionality test, that is there existed a rational connection between the measures and the objective, the impairment of the author's right was minimal, and there was proportionality between the effects of the measures and their objective. Clause (d) was found not to be justified since it did not minimally impair the author's constitutional freedoms, but imposed a permanent ban on his expressions.

The complaint

5.1 The author claims that his rights under articles 18 and 19 of the Covenant have been violated in that he is refused the right to express freely his religious opinions. In this context, his counsel emphasizes, which was recognized by the Courts, that the author never expressed his opinions in class and that he had a good record as a teacher. Counsel further states that there is no evidence that any of the students at the school had been adversely affected by the author's writings or were influenced by them, nor that the author ever committed any act of discrimination. In this context, it is pointed out that there were no Jewish students in the author's class.

5.2 Counsel argues that there is no rational connection between expressing a discriminatory religious opinion (i.e. this religion is true and that is false) and an act of discrimination (i.e. treating someone differently because of religion). In this regard, it is submitted that the author's opinions are sincere and of a religious character, opposing the philosophy of Judaism, since he feels that Christianity is under attack from Zionist interests. Counsel asserts that the requirement that an employee's conscience and religious expression be subject to State scrutiny or employer regulation in their off-duty time would make religious freedom meaningless.

5.3 Counsel further claims that the author's opinions and expressions are not contrary to Canadian law, which prohibits hate propaganda, and that he had never been prosecuted for expressing his ideas. Counsel submits that the author's case is not comparable to J.R.T. and W.G. v. Canada,[1] but rather draws comparison to the case of Vogt v. Germany,[2] decided by the European Court of Human Rights. Counsel submits that the order destroyed the author's right to teach which was his professional livelihood.

5.4 Counsel further argues that, if the Board of Inquiry was of the opinion that there was an anti-Semitic atmosphere among the students in the school district, it should have recommended measures to discipline the students committing such acts of discrimination. The author denies that his views are racist, any more than atheism is racist or Judaism itself. It is further stated that criticism of Judaism or Zionism for religious reasons cannot be equated to anti-Semitism. The author feels discriminated against, because he is convinced that a teacher publicly attacking Christianity would not be disciplined in a similar way.

The State party's submission and the author's comments thereon

6.1 In its submission of 7 September 1998, the State party offers its observations both on the admissibility and the merits of the communication. The State party submits that the communication should be deemed inadmissible both for lack of substantiation and because it is incompatible with the relevant provisions of the Covenant. Alternatively, in the event that the Committee decides that the author's communication is admissible, the State party submits that it has not violated articles 18 and 19 of the Covenant.

6.2 The State party submits that the communication should be deemed inadmissible as incompatible with the provisions of the Covenant because the publications of the author fall within the scope of article 20, paragraph 2, of the Covenant, i.e. they must be considered "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". In this regard, the State party points out that the Supreme Court of Canada found that the publications denigrated the faith and beliefs of Jewish people and called upon "true Christians" to not merely question the validity of those beliefs but to hold those of the Jewish faith in contempt. Furthermore, it is stated that the author identified Judaism as the enemy and called upon "Christians" to join in the battle.

6.3 The State party argues that articles 18, 19 and 20 of the Covenant must be interpreted in a consistent manner, and that the State party therefore cannot be in violation of articles 18 or 19 by taking measures to comply with article 20. It is submitted that freedom of religion and expression under the Covenant must be interpreted as not including the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. In this regard, the State party also invokes article 5, paragraph 1, of the Covenant, and submits that to interpret articles 18 and 19 as protecting the dissemination of anti-Semitic speech cloaked as Christianity denies Jews the freedom to exercise their religion, instils fear in Jews and other religious minorities and degrades the Christian faith.

6.4 With regard to the interpretation and application of article 20, the State party makes reference to the jurisprudence of the Committee, in particular the case of J.R.T. and W.G. v. Canada.[3] The State party notes that the author's counsel contends that the present case is distinguishable from J.R.T. and W.G. v. Canada in that Mr. Ross did not introduce his opinions into the workplace; his opinions were of a religious nature; and none of his publications were contrary to Canadian law. While acknowledging that there are some factual differences between the two cases, the State party submits that there are also important similarities between them and that the rule concerning the inadmissibility of communications incompatible with the Covenant is equally applicable. First, it is pointed out that both communications concerned anti-Semitic speech. The State party denies counsel's contention that the author's views are of a religious nature, and argues that they promote anti-Semitism and cannot be said to be religious beliefs or part of the Christian faith. Second, it is pointed out that both communications involved orders made pursuant to human rights legislation and not charges under the hate propaganda provisions of the Criminal Code. In this regard, it is submitted that counsel is wrong when he argues that the author's writings and public statements were not contrary to Canadian law. The writings and statements did, according to the State party, contravene the New Brunswick Human Rights Act as they were found to be discriminatory and to have created a poisoned environment in the school district.

6.5 The State party further submits that the author's claim under article 18 should be held inadmissible as being incompatible with the Covenant also because his opinions "do not express religious beliefs and certainly do not fall within the tenets of Christian faith". The State party argues that the author has "cloaked his views under the guise of the Christian faith but in fact his views express hatred and suspicion of the Jewish people and their religion". It is further submitted that the author has not provided any evidence showing how anti-Semitic views are part of the Christian faith, and that no such evidence would be forthcoming. Similarly, it is asserted that the author's expressions are not manifestations of a religion, as he did not publish them for the purpose of worship, observance, practice or teaching of a religion.

6.6 Lastly on the compatibility of the communication with the provisions of the Covenant, the State party invokes article 18, paragraphs 2 and 4, and claims that States parties under these provisions have an obligation to ensure that teachers within their public education systems promote respect for all religions and beliefs and actively denounce any forms of bias, prejudice or intolerance. The State party argues that if it were to permit the author to continue teaching, it could be in violation of these provisions for impeding the rights of Jewish students to express their faith and to feel comfortable and self-confident in the public school system. Thus, it is submitted that the author's claim under article 18 should be held inadmissible as being incompatible also with article 18, paragraphs 2 and 4, of the Covenant.

6.7 Furthermore, the State party submits that both the claim under article 18 and the claim under article 19 should be held inadmissible on the ground that the author has not submitted sufficient evidence to substantiate a prima facie claim. Noting that the author only provided the Committee with copies of his own submissions to the Supreme Court and the decisions of the courts, the State party argues that beyond making the bald assertion that the decision of the Supreme court infringes the author's rights under articles 18 and 19, the communication provides no specificity of terms sufficient to support its admissibility. In particular, it is submitted that nowhere is the expansive and carefully reasoned decision of a unanimous nine-person Bench of the Supreme Court subjected to a sustained critique which would support the allegations made by the author.

6.8 As to the merits of the communication, the State party first submits that the author has not established how his rights to freedom of religion and expression have been limited or restricted by the Order of the Board of Inquiry as upheld by the Supreme Court. It is argued that the author is free to express his views while employed by the school board in a non-teaching position or while employed elsewhere.

6.9 Should the Committee find that the author's rights to freedom of religion and/or expression have been limited, the State party submits that these limitations are justified pursuant to article 18, paragraph 3, and 19, paragraph 3, respectively, as they were (i) provided by law, (ii) imposed for one of the recognized purposes, and (iii) were necessary to achieve its stated purpose. The State party submits that the analysis that must be undertaken by the Committee in this respect is very similar to that which was employed by the Supreme Court of Canada under section 1 of the Charter, and that the Committee should give considerable weight to the Court's decision.

6.10 With regard to the requirement that any limitations must be provided by law, the State party points out that the author's writings and public statements were found to be discriminatory and to have created a poisoned environment in violation of subsection 5 (1) of the New Brunswick Human Rights Act. It is further stated that the Order rendered by the Board of Inquiry was the remedy granted for the violation of subsection 5 (1) and was made pursuant to the Act.

6.11 With regard to the requirement that the limitation must be imposed for one of the purposes set out in articles 18, paragraph 3, and 19, paragraph 3, respective, the State party submits that the Order was imposed both for the protection of the fundamental rights of others[4] and for the protection of public morals. As regards the first of these purposes, the State party makes reference to the case of Faurisson v. France,[5] and submits that the Order was imposed on the author for the purposes of protecting the freedom of religion and expression and the right to equality of the Jewish community. The State party points out that the Supreme Court found that the Order protected the fundamental rights and freedoms of Jewish parents to have their children educated and for Jewish children to receive an education in the public school system free from bias, prejudice and intolerance. As regards the protection of public morals, the State party submits that Canadian society is multicultural and that it is fundamental to the moral fabric that all Canadians are entitled to equality without discrimination on the basis of race, religion or nationality.

6.12 Furthermore, the State party submits that any restrictions contained in the Order were clearly necessary to protect both the fundamental rights and freedoms of the Jewish people and Canadian values of respect for equality and diversity (public morals). The State party argues that the Order was necessary to ensure that children in the school district could be educated in a school system free from bias, prejudice and intolerance and in which Canadian values of equality and respect for diversity could be fostered. Furthermore, it is argued that it was necessary to remove the author from teaching in order to remedy the poisoned environment that his writings and public statements had created. In this last regard, the State party submits, as the Supreme Court found, that teachers occupy positions of trust and confidence and exert considerable influence over their students. As a result, it is submitted that teachers should be held to a higher standard with respect to their conduct while teaching, as well as during their off-duty activities. According to the State party, the author, as a public school teacher, was in a position to exert influence on young persons who did not yet possess the knowledge or judgement to place views and beliefs into a proper context. Moreover, the Board of Inquiry heard witnesses who testified that Jewish students experienced fear, injury to self-confidence and a reluctance to participate in the school system because of the author's statements. It is submitted that to remedy this situation, it was necessary to pass the Order.

6.13 Finally, the State party notes that the author draws comparison to the European Court of Human Rights' decision in Vogt v. Germany,[6] but argues that that decision is distinguishable from the instant case in several important respects: First, the applicant in Vogt was an active member of a lawful political party for the stated purpose of promoting peace and combating neo-fascism. Secondly, the nature of speech involved in the two cases is profoundly different, as the political expression in Vogt was not of a discriminatory character as in this case.

7.1 In his comments of 27 April 1999, the author reiterates that there exists no evidence that he ever expressed any of his opinions in class. Furthermore, there exists no evidence that his privately established beliefs had any effect on his workplace, i.e. that they created a poisoned environment. The Board of Inquiry only found that it was reasonable to anticipate such effects.

7.2 The author denies that his writings and statements undermine democratic values and that they are anti-Semitic. He also denies that they amount to advocacy of religious hatred that constitutes incitement to discrimination, hostility and violence. With regard to the State party's claim in relation to article 20 of the Covenant, the author submits that nowhere in his writings does he attempt to incite hatred, but rather to "defend his religion from the hatred of others". As regards article 5 of the Covenant, the author argues that he has never stated anything to the effect that Jews cannot practice their religion without restriction. On the contrary, it is submitted that the State party denied him the rights and freedoms recognized in the Covenant, when the Supreme Court ruled that the author cannot exercise his religious freedom and still be a teacher.

7.3 Furthermore, it is submitted that, as opposed to what is held by the State party, his statements express religious beliefs within the meaning of the Covenant. The author argues that his books were written "to defend the Christian Faith and Heritage against those who would denigrate them, and to encourage people to worship God, the Holy Trinity, as revealed in the Christian Faith". According to the author, "a perusal of his books point to his desire to work with other Christians to fulfil the ancient Christian mandate to establish the Kingship of Christ in Society". In this connection, the author also points out that the Supreme Court of Canada in its judgement held that the case involved religious expression, and that it found that the Order of the Board of Inquiry infringed the author's freedom of religion.

7.4 With regard to the State party's contention that the author has not submitted evidence as to how the Order, removing him from his teaching position but allowing him to express himself while in a non-teaching position, has impinged upon the freedoms to profess his religious beliefs or his freedom to express his opinions, the author claims that in June 1996 he was handed a lay off notice by his employer. The author claims that this is "severe punishment for exercising his constitutionally guaranteed rights to freedom of religion and freedom of expression", and implies that the notice was a result of, or at least linked to, the previous Order and Supreme Court judgement against him. It is further claimed that he received no compensation or severance pay, and that the only reason given was that the job had been terminated. The author states that he has never been interviewed for, nor offered another position even though he at the time had worked the school district for almost 25 years.

Further submission by the State party and the author's comments thereon

8.1 In its further submission of 28 September 1999, the State party notes the author's assertion that there was no evidence to support the finding of a "poisoned environment" within the School District attributable to the author's writings and public statements. To contest this assertion, the State party refers to the unanimous decision of the Supreme Court and, in particular, its findings quoted in paragraph 4.7 supra. The State party argues that the Supreme Court extensively reviewed the findings of fact as to discrimination and held that there was sufficient evidence. Thus, it is submitted, the author's assertions on this question must be rejected.

8.2 With regard to the issue of whether or not the author's opinions can be deemed religious beliefs within the meaning of the Covenant, the State party recognizes that the Supreme Court of Canada considered the opinions to be "religious beliefs" within the meaning of the Canadian Charter. However, the State party points out that even if Canadian law places virtually no limits on what it considers to be religious beliefs under section 2 of the Charter, it nevertheless protects against abuses of the right to religious freedom by the limitation clause in section 1. The State party argues that while this is the approach taken under Canadian law, the jurisprudence of the Human Rights Committee suggests that it has applied a narrower interpretation with regard to article 18. In particular, the State party refers to the case of M.A.B, W.A.T. and J.-A.Y.T. v. Canada.[7] It is due to this difference in approach that the State party submits that the claim under article 18 should be held inadmissible under article 3 of the Optional Protocol, even if the similar, Canadian provisions are interpreted differently in domestic law.

8.3 With regard to the author's employment status, the State party notes that the author "has been laid off his job since 1996", but contests that this was "severe punishment for exercising his constitutionally guaranteed rights to freedom of religion and freedom of expression" or that it in any manner was connected to the previous actions against the author. It is submitted that the author's security of employment was only minimally affected by the Order of the Board of Inquiry, as upheld by the Supreme Court. It is stated that, after the Order was issued on 28 August 1991, the author was placed on leave without pay for one week only, from 4-10 September 1991. As of 11 September 1991, he was assigned to a full time position in the District office, providing assistance in the delivery of programmes to students "at risk". According to the State party, that position, originally in place for the duration of the 1991/92 school year was specifically based on the availability of funding, but in fact continued to be funded through to June 1996. The funding was lost as part of a general reorganization of the New Brunswick School System, effective 1 March 1996. This entailed the abolition of School Boards and the vesting of authority for the administration of the educational system in the Minister of Education, with a consequent reduction of both teaching and administrative positions throughout the Province.

8.4 In any event, it is submitted, the author's non-teaching position was specifically noted to fall under the terms and conditions of the collective agreement between the Board of Management and the New Brunswick Teachers' Federation, which allows for any employee to complain of an improper lay off or dismissal and, if the complaint is upheld, to obtain relief. As the author has failed to seek such relief, it is submitted that he cannot now bring unsubstantiated allegations to the Committee that his loss of employment is a result of the Order or the judgement of the Supreme Court.

9. In his submission of 5 January 2000, the author reiterates his arguments with regard to the lack of direct evidence and again points out that his controversial views never formed part of his teaching. As regards his employment status, the author notes that the Supreme Court on 3 April 1996 upheld the Order against the School Board, following which he was to be offered a non-teaching post. It is submitted that he was never offered such a post, but that in fact he was laid off as of 1 July 1996. According to counsel, the fact that the author has not been offered further employment since his lay off in 1996 "is further evidence of the contempt with which the government" treats him.

Consideration of the admissibility of the communication

10.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

10.2 The Committee notes that both parties have addressed the merits of the communication. This enables the Committee to consider both the admissibility and the merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of the grounds of admissibility referred to in the Optional Protocol.

10.3 With regard to the author's claim that his dismissal in 1996 was connected to the order of the Supreme Court and thus a result of the restrictions imposed upon his freedom of speech and freedom to manifest his religion, the Committee notes that the author has failed to make use of the domestic remedies that were in place. This part of the author's claim is thus inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

10.4 Insofar as the author claims that he is a victim of discrimination, the Committee considers that his claim is unsubstantiated, for purposes of admissibility, and thus inadmissible under article 2 of the Optional Protocol.

10.5 The Committee notes that the State party has contested the admissibility of the remainder of the communication on several grounds. First, the State party invokes article 20, paragraph 2, of the Covenant, claiming that the author's publications must be considered "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". Citing the decision of the Committee in J.R.T. and W.G. v. Canada, the State party submits that, as a matter of consequence, the communication must be deemed inadmissible under article 3 of the Optional Protocol as being incompatible with the provisions of the Covenant.

10.6 While noting that such an approach indeed was employed in the decision in J.R.T. and W.G. v. Canada, the Committee considers that restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible. In applying those provisions, the fact that a restriction is claimed to be required under article 20 is of course relevant. In the present case, the permissibility of the restrictions is an issue for consideration on the merits.

10.7 Similarly, the Committee finds that the questions whether there were restrictions on the author's right to manifest religious belief and whether any such restrictions were permissible under article 18, paragraph 3, are admissible.

10.8 The State party has also submitted that the communication should be held inadmissible as the author has not submitted sufficient evidence to support a prima facie case. The State party argues that the author, instead of filing a detailed submission to the Committee, merely relied on the decisions of the domestic courts and his own submissions to the Supreme Court. Thus, it is held, the communication "provides no specificity of terms sufficient to support its admissibility". The Committee finds, however, that the author has stated his claims of violation clearly and that the adduced material sufficiently substantiates those claims, for purposes of admissibility. Thus, the Committee proceeds with the examination of the merits of the author's claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits

11.1 With regard to the author's claim under article 19 of the Covenant, the Committee observes that, in accordance with article 19 of the Covenant, any restriction on the right to freedom of expression must cumulatively meet several conditions set out in paragraph 3. The first issue before the Committee is therefore whether or not the author's freedom of expression was restricted through the Board of Inquiry's Order of 28 August 1991, as upheld by the Supreme Court of Canada. As a result of this Order, the author was placed on leave without pay for a week and was subsequently transferred to a non-teaching position. While noting the State party's argument (see para. 6.8 supra) that the author's freedom of expression was not restricted as he remained free to express his views while holding a non-teaching position or while employed elsewhere, the Committee is unable to agree that the removal of the author from his teaching position was not, in effect, a restriction on his freedom of expression. The loss of a teaching position was a significant detriment, even if no or only insignificant pecuniary damage is suffered. This detriment was imposed on the author because of the expression of his views, and in the view of the Committee this is a restriction which has to be justified under article 19, paragraph 3, in order to be in compliance with the Covenant.

11.2 The next issue before the Committee is whether the restriction on the author's right to freedom of expression met the conditions set out in article 19, paragraph 3, i.e. that it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.

11.3 As regards the requirement that the restriction be provided by law, the Committee notes that there was a legal framework for the proceedings which led to the author's removal from a teaching position. The Board of Inquiry found that the author's off-duty comments denigrated the Jewish faith and that this had adversely affected the school environment. The Board of Inquiry held that the School Board was vicariously liable for the discriminatory actions of its employee and that it had discriminated against the Jewish students in the school district directly, in violation of section 5 of the New Brunswick Human Rights Act, due to its failure to discipline the author in a timely and appropriate manner. Pursuant to section 20 (6.2) of the same Act, the Board of Inquiry ordered the School Board to remedy the discrimination by taking the measures set out in paragraph 4.3 supra. In effect, and as stated above, the discrimination was remedied by placing the author on leave without pay for one week and transferring him to a non-teaching position.

11.4 While noting the vague criteria of the provisions that were applied in the case against the School Board and which were used to remove the author from his teaching position, the Committee must also take into consideration that the Supreme Court considered all aspects of the case and found that there was sufficient basis in domestic law for the parts of the Order which it reinstated. The Committee also notes that the author was heard in all proceedings and that he had, and availed himself of, the opportunity to appeal the decisions against him. In the circumstances, it is not for the Committee to re-evaluate the findings of the Supreme Court on this point, and accordingly it finds that the restriction was provided for by law.

11.5 When assessing whether the restrictions placed on the author's freedom of expression were applied for the purposes recognized by the Covenant, the Committee begins by noting[8] that the rights or reputations of others for the protection of which restrictions may be permitted under article 19, may relate to other persons or to a community as a whole. For instance, and as held in Faurisson v. France, restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-Semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in article 20 (2) of the Covenant. The Committee notes that both the Board of Inquiry and the Supreme Court found that the author's statements were discriminatory against persons of the Jewish faith and ancestry and that they denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. In view of the findings as to the nature and effect of the author's public statements, the Committee concludes that the restrictions imposed on him were for the purpose of protecting the "rights or reputations" of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance.

11.6 The final issue before the Committee is whether the restriction on the author's freedom of expression was necessary to protect the right or reputations of persons of the Jewish faith. In the circumstances, the Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties and responsibilities are of particular relevance within the school system, especially with regard to the teaching of young students. In the view of the Committee, the influence exerted by school teachers may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory. In this particular case, the Committee takes note of the fact that the Supreme Court found that it was reasonable to anticipate that there was a causal link between the expressions of the author and the "poisoned school environment" experienced by Jewish children in the School district. In that context, the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance. Furthermore, the Committee notes that the author was appointed to a non-teaching position after only a minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions. The Human Rights Committee accordingly concludes that the facts do not disclose a violation of article 19.

11.7 As regards the author's claims under article 18, the Committee notes that the actions taken against the author through the Human Rights Board of Inquiry's Order of August 1991 were not aimed at his thoughts or beliefs as such, but rather at the manifestation of those beliefs within a particular context. The freedom to manifest religious beliefs may be subject to limitations which are prescribed by law and are necessary to protect the fundamental rights and freedoms of others, and in the present case the issues under paragraph 3 of article 18 are therefore substantially the same as under article 19. Consequently, the Committee holds that article 18 has not been violated.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Communication No. 104/1981, Inadmissibility decision adopted on 6 April 1983.

[2] Case No. 7/1994/454/535, Judgement passed 26 September 1995. In the case, Mrs. Vogt maintained, inter alia, that her dismissal from the civil service (as a schoolteacher) on account of her political activities as a member of the German Communist Party had infringed her right to freedom of expression secured under article 10 of the European Convention. In the circumstances, the Court found that article 10 had been violated.

[3] The case concerned tape-recorded telephone messages from the author and a political party warning the callers "of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles". Pursuant to section 3 of the Human Rights Act, the Canadian Human Rights Commission ordered the author and the political party to cease using the telephone to communicate such matters. The Human Rights Committee decided that the communication from the political party

was inadmissible for lack of standing, while the communication from the author was inadmissible as incompatible with the Covenant because the disseminated messages "clearly constitute[d] advocacy of racial or religious hatred".

[4] Article 18, paragraph 3, refers to the "fundamental rights and freedoms of others" while article 19, paragraph 3, refers to the "rights and reputations of others".

[5] Communication No. 550/1993, Views adopted on 8 November 1996.

[6] See footnote No. 3.

[7] Communication No. 570/1993, Inadmissibility decision adopted on 8 April 1994.

[8] As it did in General Comment No. 10 and Communication No. 550/1993, Faurisson v. France, Views adopted on 8 November 1996.

APPENDIX

Individual opinion of Hipólito Solari Yrigoyen (dissenting)

In my opinion, paragraphs 11.1 and 11.2 of the Committee's Views should read as follows:

> Concerning the author's claim of a violation of the right protected by article 19 of the Covenant, the Committee observes that the exercise of the right to freedom of expression covered by paragraph 2 of that article entails special duties and responsibilities enumerated in paragraph 3. It cannot, therefore, accept the claim that the author's freedom of expression was restricted by the Board of Inquiry's Order of 28 August 1991 as upheld by the Supreme Court of Canada, since that Order was in keeping with article 19, paragraph 3, of the Covenant. It must also be pointed out that the exercise of freedom of expression cannot be regarded in isolation from the requirements of article 20 of the Covenant, and that it is that article that the State party invokes to justify the measures applied to the author, as indicated in paragraph 6.3 above.

(Signed) H. Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

G. Communication No. 790/1997, Cheban v. The Russian Federation (Views adopted on 24 July 2001, seventy-second session)*

Submitted by:	Mr. Sergei Anatolievich Cheban et al. (represented by counsel, Ms. Elena Kozlova)
Alleged victims:	The authors
State party:	The Russian Federation
Date of communication:	12 March 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 July 2001,

Having concluded its consideration of communication No. 790/1997 submitted to the Human Rights Committee by Mr. Sergei Anatolievich Cheban et al under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 12 March 1997, are Sergei Anatolievich Cheban, born on 27 February 1977, Sergei Alexandrovich Mishketkul, born on 20 February 1977, Vasili Ivanovich Philiptsevich, born on 14 April 1978, and Stanislav Igoervich Timokhin, born on 22 November 1978. They claim to be victims of a violation by the Russian Federation of article 14, paragraphs 1, 2 and 3 (e), and article 14, paragraph 4 of the Covenant. They assert also that they were denied a jury trial available to others, raising issues under article 26. The authors are represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

Factual background[1]

2.1 The authors were convicted on 17 February 1995, by the Moscow City Court, of criminal acts committed on 24 January 1994, consisting of rape of a minor (who was aged 13 at the time of the incident), accompanied by violence and threats, and of acting in concert by prior agreement to commit the crimes. At the time of the offences of which they were convicted, the authors were all aged between 15 and 16 years and were attending a boarding school in Moscow. The Moscow City Court reached its verdict on the basis of: the evidence given by the victim; written statements from witnesses; written statements by the authors; the police report on the arrest of the authors; and two forensic examinations which had found that the victim had had sexual relations and that the authors were capable of having sexual relations.

2.2 In passing sentence, the Court said that it took account of the age of the accused and of character references in their favour. Philiptsevich was sentenced to six years' imprisonment and the other three accused to five years' imprisonment each. On appeal in cassation, the Supreme Court upheld the decision of the Moscow City Court and confirmed the sentences. Subsequently, the Vice-President of the Supreme Court lodged with the Presidium of that Court an objection to the sentences, pursuant to the rules governing the supervision of the judiciary. On 10 April 1996 the Presidium of the Supreme Court reduced the sentences to four and a half years imprisonment for Philiptsevich and four years each for the other three accused.

The complaint

3.1 The authors assert that the Moscow City Court arrived unfairly at its conclusion, giving too much weight to the account of the victim. They assert that, since there were no eyewitnesses or other direct evidence of rape, the judge based his conclusions chiefly on the victim's statements. Counsel for the accused had called on the court to have the victim undergo psychiatric and psychological examination, in order to assess how well she was able to perceive and understand facts and circumstances, but no such examination had been undertaken.

3.2 At trial, the accused had also requested a reconstruction of the incident, and the submission of a description of the scene of the alleged crime, including photographs and diagrams, which, in the view of the authors, would have determined whether or not they were guilty of the rape alleged. These requests were denied. The authors argue that the denial of their request constitutes a breach of articles 14, paragraphs 1, 2 and 3 (e), of the Covenant.

3.3 The facts as stated by the authors may also imply claims that the State party committed breaches of article 14, paragraph 4, and article 26 of the Covenant. As regards article 14, paragraph 4, the facts as stated by the authors suggest that the court did not take into account the age of the accused. The authors sought on several occasions to invoke article 20 of the Russian Constitution, 1993, which provides that cases in which an accused subject to the death penalty may, at his request, be tried before a jury. Denial of a jury trial to the authors might also raise an issue under article 26 because of a difference in treatment between them and other accused persons who received a jury trial.

The State party's response

4.1 The State party responds that the claims of breach of constitutional rights; the assertion that the author's guilt was not sufficiently proven and that the pre-trial investigation and formalities were incomplete, have been investigated several times by the appropriate judicial authorities and have not been confirmed. The State party declares that throughout the judicial hearings the prosecution and the accused enjoyed equal rights.

4.2 The State party asserts also that a jury trial could not have been given to the accused since there was no provision in its law for trial by jury within the city of Moscow at that time.

4.3 The authors had the services of legal counsel from the moment of their arraignment, and their procedural rights were explained to them several times, in the presence of counsel.

Comments by the authors on the State party's response

5. In their comments on the State party's reply, the authors reiterate that their trial was unfair because they were prevented from gathering and submitting evidence of their innocence.

Issues and proceedings before the Committee

6.1 Before considering claims in a communication, the Human Rights Committee, in accordance with rule 87 of its rules of procedure, must decide whether the claim is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the case is not being examined under another procedure of international investigation, and that domestic remedies had been exhausted. The requirements laid out in article 5, paragraph 2, of the Optional Protocol are, therefore, satisfied.

6.3 The Committee notes that the State party has raised no objections to the admissibility of the communication.

6.4 With regard to the authors' allegations of violation of the presumption of innocence (article 14, paragraph 2, of the Covenant), the Committee finds that this claim has not been sufficiently substantiated for purposes of admissibility.

6.5 With regard to the alleged violations of article 14, paragraphs 1, 3 (e), and paragraph 4, the Committee notes that the author's claims essentially relate to the evaluation of facts and evidence as well as to the implementation of domestic law. The Committee recalls that it is in general for the courts of State parties, and not for the Committee, to evaluate the facts in a particular case and to interpret domestic legislation. The information before the Committee and the arguments advanced by the authors do not show that the Courts' evaluation of the facts and their interpretation of the law were manifestly arbitrary or amounted to a denial of justice. The Committee concludes that these claims are therefore inadmissible under articles 2 and 3 of the Optional Protocol.

6.6 The other claims submitted are admissible and the Committee proceeds to consider them on the merits.

Consideration on the merits

7.1 Although the authors do not cite article 26 of the Covenant, the Committee is of the view that it must consider, in light of the submissions of the authors, whether that article has been breached.

7.2 The claim of discrimination made by the authors is that they were denied a jury trial, while a jury trial was granted to some other accused persons in courts of the State party. The Committee notes that while the Covenant contains no provision asserting a right to a jury trial in criminal cases, if such a right is provided under the domestic law of the State party, and is granted to some persons charged with crimes, it must be granted to others similarly situated on an equal basis. If distinctions are made, they must be based on objective and reasonable grounds.

7.3 The authors claim that they should have been afforded a trial by jury, afforded to all accused persons liable to the death penalty. The Committee notes, however, that in the present case the authors were juveniles at the time the crimes were committed and thus they were not subject to the death penalty according to domestic legislation.

7.4 Another possible claim of violation of article 26 is that trial by jury was made available in trials in some parts of the country but not in Moscow where the authors were tried and convicted. The Committee notes that under the Constitution of the State party the availability of jury trial is governed by federal law, but there was no federal law on the subject. The fact that a State party that is a federal union permits differences among the federal units in respect of jury trial does not in itself constitute a violation of article 26.[2] As the authors have provided no information on cases in which jury trials have been held in non-capital cases in the city of Moscow, the Committee cannot conclude that the State party violated article 26.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any article of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The communication contains no direct presentation of the facts by either the authors or counsel.

[2] The Russian Constitution provides in its article 5 that regions, and cities with federal status, are equal units ("subjects") of the Russian Federation, have their own legislative authority, and can enact their own legislation. (Article 65 enumerates the units of the Federation. Moscow city and Moscow Region, are equal and separate "subjects" of the Russian Federation.) See also core document, HRI/CORE/1/Add.52, 25 October 1995, paras. 24 and 30.

H. Communication No. 806/1998, Thompson v. St. Vincent and the Grenadines (Views adopted on 18 October 2000, seventieth session)*

Submitted by: Mr. Eversley Thompson (represented by Mr. Saul Lehrfreund of Simons, Muirhead & Burton, London)

Alleged victim: The author

State party: St. Vincent and the Grenadines

Date of communication: 17 February 1998

Prior decisions: Special Rapporteur's combined rule 86/91 decision, transmitted to the State party on 19 February 1998 (not issued in document form)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 October 2000,

Having concluded its consideration of communication No. 806/1998 submitted to the Human Rights Committee by Mr. Eversley Thompson under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Eversley Thompson, a Vincentian national born on 7 July 1962. He is represented by Saul Lehrfreund of Simons, Muirhead and Burton, London. Counsel claims that the author is a victim of violations of articles 6 (1) and (4), 7, 10 (1), 14 (1) and 26 of the Covenant.

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* The following members of the Committee participated in the examination of the case: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The text of two individual opinions signed by five Committee members is appended to this document.

The facts as submitted by counsel

2.1 The author was arrested on 19 December 1993 and charged with the murder of D'Andre Olliviere, a four-year old girl who had disappeared the day before. The High Court (Criminal Division) convicted him as charged and sentenced him to death on 21 June 1995. His appeal was dismissed on 15 January 1996. In his petition for special leave to appeal to the Judicial Committee of the Privy Council, counsel raised five grounds of appeal, relating to the admissibility of the author's confession statements and to the directions of the judge to the jury. On 6 February 1997, the Judicial Committee of the Privy Council granted leave to appeal, and after having remitted the case to the local Court of Appeal on one issue, it rejected the appeal on 16 February 1998. With this, all domestic remedies are said to have been exhausted.

2.2 At trial, the evidence for the prosecution was that the little girl disappeared on 18 December 1993 and that the author had been seen hiding under a tree near her home. Blood, faecal material and the girl's panty were found on the beach near the family's home. The girl's body was never found.

2.3 According to the prosecution, police officers apprehended the author at his home early in the morning of 19 December 1993. They showed him a red slipper found the evening before and he said that it was his. After having been brought to the police station, the author confessed that he had sexually abused the girl and then thrown the girl into the sea from the beach. He went with the policemen to point out the place where it happened. Upon return, he made a confession statement.

2.4 The above evidence by the police was subject to a voir dire during trial. The author contested ever having made a statement. He testified that the police officers had beaten him at home and at the police station, and that he had been given electric shocks and had been struck with a gun and a shovel. His parents gave evidence that they had seen him on 20 December 1993 with his face and hands badly swollen. After the voir dire, the judge ruled that the statement was voluntary and admitted it into evidence. Before the jury, the author gave sworn evidence and again challenged the statement.

The complaint

3.1 Counsel claims that the imposition of the sentence of death in the author's case constitutes cruel and unusual punishment, because under the law of St. Vincent the death sentence is the mandatory sentence for murder. He also points out that no criteria exist for the exercise of the power of pardon, nor has the convicted person the opportunity to make any comments on any information which the Governor-General may have received in this respect.[1] In this context, counsel argues that the death sentence should be reserved for the most serious of crimes and that a sentence which is indifferently imposed in every category of capital murder fails to retain a proportionate relationship between the circumstances of the actual crime and the offender and the punishment. It therefore becomes cruel and unusual punishment. He argues therefore that it constitutes a violation of article 7 of the Covenant.

3.2 The above is also said to constitute a violation of article 26 of the Covenant, since the mandatory nature of the death sentence does not allow the judge to impose a lesser sentence taking into account any mitigating circumstances. Furthermore, considering that the sentence is mandatory, the discretion at the stage of the exercise of the prerogative of mercy violates the principle of equality before the law.

3.3 Counsel further claims that the mandatory nature of the death sentence violates the author's rights under article 6 (1) and (4).

3.4 Counsel also claims that article 14 (1) has been violated because the Constitution of St. Vincent does not permit the Applicant to allege that his execution is unconstitutional as inhuman or degrading or cruel or unusual. Further, it does not afford a right to a hearing or a trial on the question whether the penalty should be either imposed or carried out.

3.5 Counsel submits that the following conditions in Kingstown prison amount to violations of articles 7 and 10 (1) in relation to the author. He is detained in a cell measuring 8 feet by 6 feet; there is a light in his cell that remains constantly lit 24 hours a day; there is no furniture or bedding in his cell; his only possessions in his cell are a blanket and a slop pail and a cup; there is no adequate ventilation as there is no window in his cell; sanitation is extremely poor and inadequate; food is of bad quality and unpalatable and his diet consists of rice every day; he is allowed to exercise three times a week for half an hour in the dormitory. Counsel also alleges that the conditions in prison are in breach of the domestic prison rules of St. Vincent and the Grenadines. Counsel also alleges that the author's punishment is being aggravated by these conditions.

3.6 Counsel further argues that the author's detention in these conditions renders unlawful the carrying out of his sentence of death.

3.7 Counsel also claims a violation of article 14 (1) because no legal aid is available for constitutional motions and the author, who is indigent, is therefore denied the right of access to court guaranteed by section 16 (1) of the Constitution.

The Committee's request for interim measures of protection

4.1 On 19 February 1998, the communication was submitted to the State party, with the request to provide information and observations in respect of both admissibility and merits of the claims, in accordance with rule 91, paragraph 2, of the Committee's rules of procedure. The State party was also requested, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author, while his case was under consideration by the Committee.

4.2 On 16 September 1999, the Committee received information to the effect that a warrant for the author's execution had been issued. After having sent an immediate message to the State party, reminding it of the rule 86 request in the case, the State party informed the Committee that it was not aware of having received the request nor the communication concerned. Following an exchange of correspondence between the Special Rapporteur for New Communications and the State party's representatives, and after a constitutional motion had been presented to the High Court of St. Vincent and the Grenadines, the State party agreed to grant the author a stay of execution in order to allow the Committee to examine his communication.

The State party's submission

5.1 By submission of 16 November 1999, the State party notes that the author has sought redress for his grievances by way of constitutional motion, which was dismissed by the High Court on 24 September 1999. The Court rejected declarations sought by counsel for the author that he was tried without due process and the protection of the law, that the carrying out of the death sentence was unconstitutional because it constituted inhuman or degrading punishment, that the prison conditions amounted to inhuman and degrading treatment, and that the author had a legal right to have his petition considered by the United Nations Human Rights Committee. The State party submits that, in order to expedite the examination by the Committee, it will raise no objection to the admissibility of the communication for reasons of non-exhaustion of domestic remedies.

5.2 The State party submits that the mandatory nature of the death penalty is allowed under international law. It explains that a distinction is made in the criminal law in St. Vincent and the Grenadines between different types of unlawful killing. Killings which amount to manslaughter are not subject to the mandatory death penalty. It is only for the offence of murder that the death sentence is mandatory. Murder is the most serious crime known to law. For these reasons the State party submits that the death penalty in the present case was imposed in accordance with article 6 (2) of the Covenant. The State party also denies that a violation of article 7 occurred in this respect, since the reservation of the death penalty to the most serious crime known to law retains the proportionate relationship between the circumstances of the crime and the penalty. The State party likewise rejects counsel's claim that there has been discrimination within the meaning of article 26 of the Covenant.

5.3 The State party also notes that the author had a fair trial, and that his conviction was reviewed and upheld by the Court of Appeal and the Privy Council. Accordingly, the death penalty imposed upon the author does not constitute arbitrary deprivation of his life within the meaning of article 6 (1) of the Covenant.

5.4 As to the alleged violation of article 6 (4) of the Covenant, the State party notes that the author has the right to seek pardon or commutation and that the Governor General may exercise the prerogative of mercy pursuant to sections 65 and 66 of the Constitution in the light of advice received from the Advisory Committee.

5.5 With regard to prison conditions and treatment in prison, the State party notes that the author has not shown any evidence that his conditions of detention amount to torture or cruel, inhuman or degrading treatment or punishment. Nor is there any evidence that he was treated in violation of article 10 (1) of the Covenant. According to the State party, the general statements made in the communication do not evidence any specific breach of the relevant articles.

Moreover, the State party notes that this matter was considered by the High Court when hearing the constitutional motion, and that the Court rejected it. The State party refers to the Committee's constant jurisprudence that the Committee is not competent to re-evaluate the facts and evidence considered by the Court, and concludes that the author's claim should be rejected. The State party further refers to the Committee's jurisprudence that prolonged periods of detention cannot be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.

5.6 The State party also argues that even if there had been a violation of the author's rights in relation to prison conditions, this would not render the carrying out of the death sentence unlawful and a violation of articles 6 and 7 of the Covenant. In this context, the State party makes reference to the Privy Council's decision in Thomas and Hilaire v. Attorney-General of Trinidad and Tobago, where the Privy Council considered that even if the prison conditions constituted a breach of the appellants constitutional rights, commutation of the sentence would not be the appropriate remedy and the fact that the conditions in which the condemned man had been kept prior to execution infringed his constitutional rights did not make a lawful sentence unconstitutional.

5.7 As to counsel's claim that the author's right to access to the constitutional court was violated, the State party notes that the author has indeed presented and pursued a constitutional motion in the High Court, during which he was represented by experienced local counsel. After his motion was dismissed, the author gave notice of appeal. On 13 October 1999, he withdrew his appeal. During these proceedings he was again represented by the same counsel. The State party submits that this is evidence that there has been no conduct on the part of the State which has had the practical effect of denying the author access to court.

Counsel's comments

6.1 In his comments, counsel maintains that the author's death sentence violates various provisions of the Covenant because he was sentenced to death without the sentencing judge considering and giving effect to his character, his personal circumstances or those of the crime. In this connection, counsel refers to the report by the Inter-American Commission on Human Rights in the case of Hilaire v. Trinidad and Tobago.[2]

6.2 With respect to the prerogative of mercy, counsel argues that the State party has not appreciated that the right to apply for pardon must be an effective right. In the author's case, he cannot effectively present his case for mercy and thus the right to apply for mercy is theoretical and illusory. The author cannot participate in the process, and is merely informed of the outcome. According to counsel, this means that the decisions on mercy are taken on an arbitrary basis. In this connection, counsel notes that the Advisory Committee does not interview the prisoner or his family. Moreover, no opportunity is given to the condemned person to respond to possible aggravating information which the Advisory Committee may have in its possession.

6.3 With regard to the prison conditions, counsel produces an affidavit sworn by the author, dated 30 December 1999. He states that his cell in Kingstown prison, where he was detained from 21 June 1995 to 10 September 1999, was 8 feet by 6 feet in size, and that the only articles with which he was supplied in his cell were a blanket, a slop pail, a small water container and a bible. He slept on the floor. In the cell there was no electric lighting, but there was an electric light bulb in the corridor adjacent to the cell, which was kept on night and day. He states that he was unable to read because of the poor lighting. He was allowed exercise for at least three times a week in the corridor adjacent to his cell. He did not exercise in the open air and did not get any sunlight. Guards were always present. The food was unpalatable and there was little variety (mainly rice). During a fire on 29 July 1999 caused by a prison riot, he was locked in his cell and only managed to save himself when other prisoners broke in through the roof. He is only allowed to wear prison clothes, which are rough on the skin. On 10 September 1999, he was placed in a cell in Fort Charlotte, an 18th century prison. The cell in which he is now held is moist and the floor is damp. He is supplied with a small mattress. The cell is dark night and day, as the light of the electric bulb in the corridor does not penetrate into the cell. He is given exercise daily but inside the building and he does not get any sunlight. Because of the damp conditions, his legs started swelling and he reported this to the authorities, who took him to hospital for examination on 29 December 1999. He adds that he was scheduled to be hanged on 13 September 1999 and that he was taken from his cell to the gallows and that his lawyer was able to obtain a stay of execution only fifteen minutes before the scheduled execution. He states that he has been traumatized and disoriented.

6.4 Concerning the author's right of access to court, counsel submits that the fact that the author was fortunate enough to persuade counsel to take his recent constitutional case pro bono does not relieve the State party of its obligation to provide legal aid for constitutional motions.

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that it appears from the facts before it that the author filed a constitutional motion before the High Court of St. Vincent and the Grenadines. The Committee considers therefore that the author has failed to substantiate, for purposes of admissibility, his claim under article 14 (1) of the Covenant, that the State party denied the author the right of access to court in this respect.

7.3 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, that the remaining claims may raise issues under articles 6, 7, 10 and 26 of the Covenant. The Committee proceeds therefore without further delay to the consideration of the merits of these claims.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 Counsel has claimed that the mandatory nature of the death sentence and its application in the author's case, constitutes a violation of articles 6 (1), 7 and 26 of the Covenant. The State party has replied that the death sentence is only mandatory for murder, which is the most serious crime under the law, and that this in itself means that it is a proportionate sentence. The Committee notes that the mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offence. The death penalty is mandatory in all cases of "murder" (intentional acts of violence resulting in the death of a person). The Committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. The Committee finds that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation or article 6, paragraph 1, of the Covenant.

8.3 The Committee is of the opinion that counsel's arguments related to the mandatory nature of the death penalty, based on articles 6 (2), 7, 14 (5) and 26 of the Covenant do not raise issues that would be separate from the above finding of a violation of article 6 (1).

8.4 The author has claimed that his conditions of detention are in violation of articles 7 and 10 (1) of the Covenant, and the State party has denied this claim in general terms and has referred to the judgement by the High Court, which rejected the author's claim. The Committee considers that, although it is in principle for the domestic courts of the State party to evaluate facts and evidence in a particular case, it is for the Committee to examine whether or not the facts as established by the Court constitute a violation of the Covenant. In this respect, the Committee notes that the author had claimed before the High Court that he was confined in a small cell, that he had been provided only with a blanket and a slop pail, that he slept on the floor, that an electric light was on day and night, and that he was allowed out of the cell into the yard one hour a day. The author has further alleged that he does not get any sunlight, and that he is at present detained in a moist and dark cell. The State party has not contested these claims. The Committee finds that the author's conditions of detention constitute a violation of article 10 (1) of the Covenant. Insofar as the author means to claim that the fact that he was taken to the gallows after a warrant for his execution had been issued and that he was removed only fifteen minutes before the scheduled execution constituted cruel, inhuman or degrading treatment, the Committee notes that nothing before the Committee indicates that the author was not removed from the gallows immediately after the stay of execution had been granted. The Committee therefore finds that the facts before it do not disclose a violation of article 7 of the Covenant in this respect.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of articles 6 (1) and 10 (1) of the Covenant.

10. Under article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide Mr. Thompson with an effective and appropriate remedy, including commutation. The State party is under an obligation to take measures to prevent similar violations in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Under section 65 of the Constitution, the Governor General may exercise the prerogative of mercy, in accordance with the advice of the Minister who acts as Chairman of the Advisory Committee on the prerogative of mercy. The Advisory Committee consists of the Chairman (one of the Cabinet Ministers), the Attorney-General and three to four other members appointed by the Governor General on the advice of the Prime Minister. Of the three or four Committee members at least one shall be a Minister and one other shall be a medical practitioner. Before deciding on the exercise of the prerogative of mercy in any death penalty case, the Committee shall obtain a written report of the case from the trial judge (or the Chief Justice, if a report from the trial judge cannot be obtained) together with such other information derived from the record of the case or elsewhere as he may require.

[2] Commission report No. 66/99, case No. 11.816, approved by the Commission on 21 April 1999, not made public.

APPENDIX

Individual opinion by Lord Colville (dissenting)

The majority decision is based solely on the law which imposes a mandatory death sentence upon the category of crime, murder, for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offence. This conclusion has been reached without any assessment of either such set of circumstances, which exercise would in any case be beyond the Committee's jurisdiction. The majority, therefore, have founded their opinion on the contrast between the common law definition of murder, which applies in the State, and a gradation of categories of homicide in civil law jurisdictions and, by statute, in some States whose criminal law derives from common law. Thus the majority decision is not particular to this author but has wide application on a generalized basis. The point has now for the first time been taken in this communication despite Views on numerous earlier communications arising under (inter alia) a mandatory death sentence for murder; on those occasions no such stance was adopted.

In finding, in this communication, that the carrying out of the death penalty in the author's case would constitute on arbitrary deprivation of his life in violation of article 6.1 of the Covenant, the wrong starting-point is chosen. The terms of paragraph 8.2 of the majority decision fail to analyse the carefully-constructed provisions of the entirety of article 6. The article begins from a position in which it is accepted that capital punishment, despite the exhortation in article 6.6, remains an available sentence. It then specifies safeguards, and these are commented on as follows:

(a) The inherent right to life is not to be subject to arbitrary deprivation. The subsequent provisions of the article state the requirements which prevent arbitrariness but which are not addressed by the majority except for article 6.4, as to which there now exists jurisprudence which appears to have been overlooked: (see below);

(b) Article 6.2 underlines the basic flaw in the majority's reasoning. There is no dispute that murder is a most serious crime; that is, however, subject to the majority's view that a definition of murder in common law may encompass offences which are not to be described as "most serious." Whilst this does not form part of their decision in those terms, the inevitable implication is that "murder" must be redefined.

The second point on article 6.2 emphasizes that the death penalty can only be carried out pursuant to a final decision by a competent court. It follows inescapably from this that the actual law which compels the trial judge to pass a sentence of death when a person is convicted of murder does not and cannot in itself offend article 6.1 and certainly not because factual and personal circumstances are ignored: if the prosecuting authority decides, in a homicide case, to bring a charge of murder, a number of avenues immediately exist for the defence to counter, in the trial court, this accusation. These include:

- self-defence: unless the prosecution can satisfy the tribunal of fact that the defendant's actions, which led to the death, exceeded a proportional response, in his own perception of the circumstances, to the threat with which he was faced, the defendant must be completely acquitted of any crime;

- other circumstances, surrounding the crime and relating fundamentally to the prevailing situation or the defendant's state of mind, enable the tribunal of fact to find that, if these defences have not been disproved by the prosecution (the onus is never on the defendant), the charge of murder can be reduced to manslaughter which does not carry a mandatory death sentence. According to the approach adopted by the defence and the evidence adduced by the parties, the judge is bound to explain these issues; if this is not done in accordance with legal precedent the failure will lead to any conviction being quashed;

- the issues which may thus be raised by the defence need only be exemplified: one is diminished responsibility by the defendant for his actions (falling short of such mental disorder as would lead, not to a conviction, but to an order for treatment in a psychiatric hospital); or provocation, which by judicial decision has been extended to include the "battered partner syndrome", whether resulting from an instantaneous or cumulative basis of aggravation by the victim;

- as a result, the verdict indicates whether murder is the only possible crime for which the defendant can be convicted. Questions of law which may undermine a conviction for murder can be taken to the highest appellate tribunal. It was by such an appeal that the law has recognized prolonged domestic violence or abuse as constituting a "provocation", thereby reducing murder, in proper cases, to manslaughter.

No comments arise in this case under article 6.3 or 6.5. Article 6.4 has, however, recently assumed a significance which the majority decision appears to have disregarded. It has always been the case that the Head of State must be advised by the relevant Minister or advisory body such as the Privy Council, whether the death penalty shall in fact be carried out. This system is necessitated by article 6.4 and it involves a number of preliminary steps: as the majority says in paragraph 8.2, these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. This is not only a correct statement but constitutes the essence and virtue of article 6.4; exactly this process is in place in the State.

The Judicial Committee of the Privy Council has, however, delivered its advice in the case of Lewis and others v. A.G. of Jamaica & another, dated 12 September 2000. Whilst Lord Slynn's majority opinion is not binding in any common law jurisdiction, it has such persuasive authority that it is certain to be given effect. He indicates that in Jamaica by its Constitution, but similarly elsewhere:

- A written report from the trial judge is available to the person or body advising on pardon or commutation of sentence. (It should be said, by way of gloss to this practice, that the trial judge will have seen the defendant and the witnesses at first hand in the course of the trial, and also will have had access to other material relating to the circumstances of the case and of the defendant which was never used in the trial itself. Evidence, inadmissible for production to the tribunal of fact, may, for example, contain much revealing information.)

- "Such other information derived from the record of the case or elsewhere" shall be forwarded to the authority empowered to grant clemency.

- In practice the condemned accused has never been denied the opportunity to make representations which will be considered by that authority.

Where Lewis breaks new ground is in the advice that the procedures followed in the process of considering a person's petition are open to judicial review. It is necessary that the condemned person should be given notice of the date on which the clemency authority will consider his case. That notice should be sufficient for him or his advisers to prepare representations before a decision is taken. Lewis thus formalizes a defendant's right to make representations and requires that these be considered.

The inevitable result of this analysis of article 6 as a whole together with judicial ruling likely to be given effect on all common law jurisdictions, including St. Vincent and the Grenadines, is that questions of arbitrariness do not depend on the trial and sentence at first instance, let alone in the mandatory nature of the sentence to be imposed on conviction for murder. There is no suggestion that arbitrariness has arisen in the course of the appellate procedures. The majority's view, therefore, must depend on a decision that the terms of article 6.4, as given effect in a common law jurisdiction, must incorporate an arbitrary decision, "without considering whether this exceptional form of punishment is appropriate in the circumstances" of the particular case (para 8.2). This is manifestly incorrect, as a matter of long-standing practice and now of persuasive advice from the Privy Council; it is no longer merely a matter of conscientious consideration by the authority but a matter of judicial reviewability of its decision.

Any interpretation finding arbitrariness in the light of existing common law procedures can only imply that full compliance with article 6.4 does not escape the association of arbitrariness under article 6.1. Such internal inconsistency should not be applied to interpretation of the Covenant, and can only be the result of a mistaken straining of the words of article 6.

On the facts of this case and the course of any clemency process which may yet ensue, I cannot agree that there has been any violation of article 6.1 of the Covenant.

(Signed) Lord Colville

[Done in English, French and Spanish, the English text being the original version. Subsequently to be translated in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

APPENDIX

Individual opinion by Mr. David Kretzmer, co-signed by Mr. Abdelfattah Amor, Mr. Maxwell Yalden and Mr. Abdallah Zakhia (dissenting)

A. Past jurisprudence

1. Like many of my colleagues, I find it unfortunate that the Covenant does not prohibit the death penalty. However, I do not find this a reason to depart from accepted rules of interpretation when dealing with the provisions of the Covenant on the death penalty. I am therefore unable to agree with the Committee's view that by virtue of the fact that the death sentence imposed on the author was mandatory, the State party would violate the author's right, protected under article 6, paragraph 1, not to be arbitrarily deprived of his life, were it to carry out the sentence.

2. Mandatory death sentences for murder are not a novel question for the Committee. For many years the Committee has dealt with communications from persons sentenced to death under legislation that makes a death sentence for murder mandatory. (See, e.g., Communication No. 719/1996, Conroy Levy v. Jamaica; Communication No. 750/1996, Silbert Daley v. Jamaica; Communication No. 775/1997, Christopher Brown v. Jamaica.) In none of these cases has the Committee intimated that the mandatory nature of the sentence involves a violation of article 6 (or any other article) of the Covenant. Furthermore, in fulfilling its function under article 40 of the Covenant, the Committee has studied and commented on numerous reports of States parties in which legislation makes a death sentence for murder mandatory. While in dealing with individual communications the Committee usually confines itself to arguments raised by the authors, in studying State party reports the initiative in raising arguments regarding the compatibility of domestic legislation with the Covenant lies in the hands of the Committee itself. Nevertheless, the Committee has never expressed the opinion in Concluding Observations that a mandatory death sentence for murder is incompatible with the Covenant. (See, e.g., the Concluding Observations of the Committee of 19.1.97 on Jamaica's second periodic report, in which no mention is made of the mandatory death sentence).

It should also be recalled that in its General Comment No.6 that concerns article 6 of the Covenant, the Committee discussed the death penalty. It gave no indication that mandatory death sentences are incompatible with article 6.

The Committee is not bound by its previous jurisprudence. It is free to depart from such jurisprudence and should do so if it is convinced that its approach in the past was mistaken. It seems to me, however, that if the Committee wishes States parties to take its jurisprudence seriously and to be guided by it in implementing the Covenant, when it changes course it owes the States parties and all other interested persons an explanation of why it chose to do so. I regret that in its Views in the present case the Committee has failed to explain why it has decided to depart from its previous position on the mandatory death sentence.

B. Article 6 and mandatory death sentences

3. In discussing article 6 of the Covenant, it is important to distinguish quite clearly between a mandatory death sentence and mandatory capital punishment. The Covenant itself makes a clear distinction between imposition of a death *sentence* and *carrying out* the sentence. Imposition of the death sentence by a court of law after a trial that meets all the requirements of article 14 of the Covenant is a *necessary*, but *insufficient*, condition for carrying out the death penalty. Article 6, paragraph 4, gives every person sentenced to death the right to seek pardon or commutation of the sentence. It is therefore obvious that the Covenant expressly prohibits a mandatory death penalty. However, the question that arises in this case does not relate to mandatory capital punishment or a mandatory death penalty, but to a mandatory death *sentence*. The difference is not a matter of semantics. Unfortunately, in speaking of the mandatory death penalty the Committee has unwittingly conveyed the wrong impression. In my mind this has also led it to misstate the issue that arises. That issue is not whether a State party may carry out the death penalty without regard to the personal circumstances of the crime and the defendant, but whether the Covenant requires that courts be given discretion in determining whether to impose the death sentence for murder.

4. Article 6, paragraph 1, protects the inherent right to life of every human being. It states that no one shall be arbitrarily deprived of his life. Had this paragraph stood alone, a very strong case could have been made out that capital punishment itself is a violation of the right to life. This is indeed the approach which has been taken by the constitutional courts of two States when interpreting their constitutions (see the decision of the South African Constitutional Court in State v. Makwanyane [1995] 1 LRC 269; Decision No. 23/1990 (X.31) AB of the Hungarian Constitutional Court). Unfortunately, the Covenant precludes this approach, since article 6 permits the death penalty in countries which have not abolished it, provided the stringent conditions laid down in paragraphs 2, 4 and 5 and in other provisions of the Covenant are met. When article 6 of the Covenant is read in its entirety, the ineluctable conclusion must be that carrying out a death penalty cannot be regarded as a violation of article 6, paragraph 1, *provided all these stringent conditions have been met*. The ultimate question in gauging whether carrying out a death sentence constitutes violation of article 6 therefore hinges on whether the State party has indeed complied with these conditions.

5. The first condition that must be met is that sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the offence. In the present case the Committee does not expressly base its finding of a violation on breach of this condition. However, the Committee mentions that "mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty" and that the "death penalty is mandatory in all cases of murder". While the Committee does not mention article 6, paragraph 2, in the absence of any other explanation it would seem that the Committee has doubts about the compatibility with the Covenant of imposition of the death sentence for murder (the category of crime for which the death sentence is mandatory in the law of the State party). One can only assume that these doubts are based on the fear that the category of murder may include crimes that are not the most serious. I find it quite disturbing that the Committee is prepared to intimate that cases of murder may not be a most serious crime. The Committee itself has stated that the right to life is the

supreme right (see General Comment No. 6). Intentional taking of another person's life in circumstances which give rise to criminal liability must therefore, by its very nature, be regarded as a most serious crime. From the materials presented to the Committee in this communication it appears that a person is guilty of the crime of murder under the law of the State party if, with malice aforethought, he or she causes the death of another. The State party has explained (and this has not been contested) that the crime of murder does not include "killings which amount to manslaughter (for example by reason of provocation or diminished responsibility)". In these circumstances every case of murder, for which a person is criminally liable, must be regarded as a most serious crime. This does not mean, of course, that the death penalty should be imposed, nor that a death sentence should be carried out, if imposed. It does mean, however, that imposition of the death sentence cannot, per se, be regarded as incompatible with the Covenant.

6. In determining whether a defendant on a charge of murder is criminally liable the court must consider various personal circumstances of the defendant, as well as the circumstances of the particular act which forms the basis of the crime. As has been demonstrated in the opinion of my colleague, Lord Colville, these circumstances will be relevant in determining both the mens rea and actus reus required for criminal liability, as well as the availability of potential defences to criminal liability, such as self-defence. These circumstances will also be relevant in determining whether there was provocation or diminished responsibility, which, under the law of the State party, remove an act of intentional killing from the category of murder. As all these matters are part of the determination of the criminal charge against the defendant, under article 14, paragraph 1, of the Covenant they must be decided by a competent, independent and impartial tribunal. Were courts to be denied the power to decide on any of these matters, the requirements of article 14 would not be met. According to the jurisprudence of the Committee, in a case involving the death penalty this would mean that carrying out the death sentence would constitute a violation of article 6. It has not been argued that the above conditions were not complied with in the present case. Nevertheless, the Committee states that it would be a violation of the author's right not to be arbitrarily deprived of his life, if the State party were to carry out the death penalty "without regard to the defendant's personal circumstances or the circumstances of the particular offence". (See paragraph 8.2 of the Committee's Views.) As it has not been claimed that personal circumstances of the particular offence relevant to the criminal liability for murder of the author were not taken into account by the courts, it is obvious that the Committee is referring to other circumstances, which have no bearing on the author's liability for murder. Article 6, paragraph 4, of the Covenant does indeed demand that the State party have regard to such circumstances before carrying out sentence of death. There is absolutely nothing in the Covenant, however, that demands that the *courts* of the State party must be the domestic organ that has regard to these circumstances, which, as stated, are not relevant in determination of the criminal charge.

7. In many societies, the law lays down a maximum punishment for a given crime and courts are given discretion in determining the appropriate sentence in a given case. This may very well be the best system of sentencing (although many critics argue that it inevitably results in uneven or discriminatory sentencing). However, in dealing with the issue of sentencing, as with all other issues relating to interpretation of the Covenant, the question that the Committee must ask is not whether a specific system seems the best, but whether such a system is demanded under the Covenant. It is all too easy to assume that the system with which Committee members

are most familiar is demanded under the Covenant. But this is an unacceptable approach in interpreting the Covenant, which applies at the present time to 144 State parties, with different legal regimes, cultures and traditions.

8. The essential question in this case is whether the *Covenant demands* that *courts* be given discretion in deciding the appropriate sentence in each case. There is no provision in the Covenant that would suggest that the answer to this question is affirmative. Furthermore, an affirmative answer would seem to imply that minimum sentences for certain crimes, such as rape and drug-dealing (accepted in many jurisdictions) are incompatible with the Covenant. I find it difficult to accept this conclusion.

Mandatory sentences (or minimum sentences, which are in essence mandatory) may indeed raise serious issues under the Covenant. If such sentences are disproportionate to the crimes for which they are imposed, their imposition may involve a violation of article 7 of the Covenant. If a mandatory death sentence is imposed for crimes that are not the most serious crimes, article 6, paragraph 2 of the Covenant is violated. However, whether such sentences are advisable or not, if all provisions of the Covenant regarding punishment are respected, the fact that the minimum or exact punishment for the crime is set by the legislature, rather than the court, does not of itself involve a violation of the Covenant. Carrying out such a sentence that has been imposed by a competent, independent and impartial tribunal established under law after a trial that meets all the requirements of article 14 cannot be regarded as an arbitrary act.

I am well aware that in the present case the mandatory sentence is the death sentence. Special rules do indeed apply to the death sentence. It may only be imposed for the most serious crimes. Furthermore, the Covenant expressly demands that persons sentenced to death be given the right to request pardon or commutation before the sentence is carried out. No parallel right is given to persons sentenced to any other punishment. There is, however, no provision in the Covenant that demands that courts be given sentencing discretion in death penalty cases that they do not have to be given in other cases.

In summary: there is no provision in the Covenant that requires that courts be given discretion to determine the exact sentence in a criminal case. If the sentence itself does not violate the Covenant, the fact that it was made mandatory under legislation, rather than determined by the court, does not change its nature. In death penalty cases, if the sentence is imposed for a most serious crime (and any instance of murder is, by definition, a most serious crime), it cannot be regarded as incompatible with the Covenant. I cannot accept that carrying out a death sentence that has been imposed by a court in accordance with article 6 of the Covenant after a trial that meets all the requirements of article 14 can be regarded as an *arbitrary* deprivation of life.

9. As stated above, there is nothing in the Covenant that demands that courts be given sentencing discretion in criminal cases. Neither is there any provision that makes *sentencing* in cases of capital offences any different. This does not mean, however, that a duty is not imposed on States parties to consider personal circumstances of the defendant or circumstances of the particular offence before carrying out a death sentence. On the contrary, a death sentence is different from other sentences in that article 6, paragraph 4, expressly demands that anyone

under sentence of death shall have the right to seek pardon or commutation and that amnesty, pardon or commutation may be granted in all cases. It must be noted that article 6, paragraph 4, recognizes a *right*. Like all other rights, recognition of this right by the Covenant imposes a legal obligation on States parties to respect and ensure it. States parties are therefore legally bound to consider in good faith all requests for pardon or commutation by persons sentenced to death. A State party that fails to do so violates the right of a condemned person under article 6, paragraph 4, with all the consequences that flow from violation of a Covenant right, including the victim's right to an effective remedy.

The Committee states that "existence of a right to seek a pardon or commutation does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to the appropriate judicial review of all aspects of a criminal case". This statement does not help to make the Committee's approach coherent. In order to comply with the requirements of article 6, paragraph 4, a State party is bound to consider in good faith all personal circumstances and circumstances of the particular crime which the condemned person wishes to present. It is indeed true that the decision-making body in the State party may also take into account other factors, which may be considered relevant in granting the pardon or commutation. However, a court which has discretion in sentencing may also take into account a host of factors other than the defendant's personal circumstances or circumstances of the crime.

10. I may now summarize my understanding of the legal situation regarding mandatory death sentences for murder:

(a) The question of whether a death sentence is compatible with the Covenant depends on whether the conditions laid down in article 6 and other articles of the Covenant, especially article 14, are complied with;

(b) Carrying out a death sentence imposed in accordance with the requirements of article 6 and other articles of the Covenant cannot be regarded as arbitrary deprivation of life;

(c) There is nothing in the Covenant that demands that courts be given discretion in sentencing. Neither is there a special provision that makes sentencing in death penalty cases different from other cases;

(d) The Covenant expressly demands that States parties must have regard to particular circumstances of the defendant or the particular offence before carrying out a death sentence. A State party has a legal obligation to take such circumstances into account in considering applications for pardon or commutation. The consideration must be carried out in good faith and according to a fair procedure.

C. Violation of the author's rights in the present case

11. Even if I had agreed with the Committee on the legal issue I would have found it difficult to agree that the author's rights were violated in this case.

In the context of an individual communication under the Optional Protocol the issue is not the compatibility of legislation with the Covenant, but whether the author's rights were violated. (See, e.g., Faurisson v. France, in which the Committee stressed that it was not examining whether the legislation on the basis of which the author had been convicted was compatible with article 19 of the Covenant, but whether in convicting the author on the specific facts of his case the author's right to freedom of expression had been violated). In the present case the author was convicted of a specific crime: murder of a little girl. Even if the category of murder under the law of the State party may include some crimes which are not the most serious, it is clear that the crime of which the author was convicted is not among these. Neither has the author pointed to any personal circumstances or circumstances of the crime that should have been regarded as mitigating circumstances but could not be considered by the courts.

12. Finally I wish to emphasize that the Covenant imposes strict limitations on use of the death penalty, including the limitation in article 6, paragraph 4. In the present case, it has not been contested that the author has the right to apply for pardon or commutation of his sentence. An advisory committee must look into the application and make recommendations to the Governor-General on any such application. Under the rules laid down by the Privy Council in the recent case of Neville Lewis et al v. Jamaica, the State party must allow the applicant to submit a detailed petition setting out the circumstances on which he bases his application, he must be allowed access to the information before the committee and the decision on the pardon or commutation must be subject to judicial review.

While the author has made certain general observations relating to the pardon or commutation procedures in the State party, he has not argued that he has submitted an application for pardon or commutation that has been rejected. He therefore cannot claim to be a victim of violation of his rights under article 6, paragraph 4, of the Covenant. Clearly, were the author to submit an application for pardon or commutation that was not given due consideration as required by the Covenant and the domestic legal system he would be entitled to an effective remedy. Were that remedy denied him the doors of the Committee would remain open to consider a further communication.

(Signed) David Kretzmer

(Signed) Abdelfattah Amor

(Signed) Maxwell Yalden

(Signed) Abdallah Zakhia

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

I. Communication No. 818/1998, Sextus v. Trinidad and Tobago (Views adopted on 16 July 2001, seventy-second session)*

Submitted by:	Mr. Sandy Sextus (represented by counsel, Mr. Saul Lehrfreund)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	23 April 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 2001,

Having concluded its consideration of communication No. 818/1998 submitted to the Human Rights Committee by Mr. Sandy Sextus under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 23 April 1997, is Mr Sandy Sextus, a national of Trinidad and Tobago, presently an inmate of State Prison, Trinidad. He claims to be a victim of violations of Trinidad and Tobago of articles 2, paragraph 3, 7, 9, paragraph 3, 10, paragraph 1, 14, paragraphs 1, 3 (c) and 5, of the International Covenant on Civil and Political Rights. He is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

The facts as presented by the author

2.1 On 21 September 1988, the author was arrested on suspicion of murdering his mother-in-law on the same day. Until his trial in July 1990, the author was detained on pre-trial remand at Golden Grove Prison, Arouca, in a cell measuring 9 feet by 6 feet which he shared with 7 to 11 other inmates. He was not provided with a bed, and forced to sleep on a concrete floor or on old cardboard and newspapers.

2.2 After a period of over 22 months, the author was brought to trial on 23 July 1990 in the High Court of Justice. On 25 July 1990, the author was convicted by unanimous jury verdict and sentenced to death for the murder charged. From this point (until commutation of his sentence), the author was confined in Port-of-Spain State Prison (Frederick Street) in a solitary cell measuring 9 feet by 6 feet, containing an iron bed, mattress, bench and table.[1] In the absence of integral sanitation, a plastic pail was provided as toilet. A small ventilation hole measuring 8 inches by 8 inches, providing inadequate ventilation, was the only opening. In the absence of any natural light, the only light was provided by a fluorescent strip light illuminated 24 hours a day (located above the door outside the cell). Due to his arthritis, the author never left his cell save to collect food and empty the toilet pail. Due to stomach problems, the author was placed on a vegetable diet, and when these were not provided the author went without food. The author did not receive a response from the Ombudsman on a written complaint on this latter matter.

2.3 After a period of over 4 years and 7 months, on 14 March 1995, the Court of Appeal refused the author's application for leave to appeal.[2] On 10 October 1996, the Judicial Committee of the Privy Council in London rejected the author's application for special leave to appeal against conviction and sentence. In January 1997, the author's death sentence was commuted to 75 years' imprisonment.

2.4 From that point, the author has been detained in Port-of-Spain Prison in conditions involving confinement to a cell measuring 9 feet by 6 feet together with 9 to 12 other prisoners, which overcrowding causes violent confrontations between prisoners. One single bed is provided for the cell and therefore the author sleeps on the floor. One plastic bucket is provided as slop pail and is emptied once a day, such that it sometimes overflows. Inadequate ventilation consists of a 2 foot by 2 foot barred window. The prisoner is locked in his cell, on average 23 hours a day, with no educational opportunities, work or reading materials. The location of the prison food-preparation area, around 2 metres from where the prisoners empty their slop pails, creates an obvious health hazard. The contention is repeated that the provision of food does not meet the author's nutritional needs.

The complaint

3.1 The author's complaint centres on alleged excessive delays in the judicial process in his case, and the conditions of detention suffered by him at various stages in that process.

3.2 As to the allegation of delay, the author contends that his rights under articles 9, paragraph 3, and 14, paragraph 3 (c), were violated in that there was a 22-month delay in bringing his case to trial. That was the period from his arrest on 21 September 1988, being the day the offence for which he was convicted occurred, until the commencement of his trial on 23 July 1990. The author contends little investigation was performed by the police in his case.

3.3 The author cites the Committee's Views in Celiberti de Casariego v. Uruguay, Millan Sequeira v. Uruguay and Pinkney v. Canada,[3] where comparable periods of delay were found to be in violation of the Covenant. Relying on Pratt Morgan v. Attorney-General of Jamaica,[4] the author argues that the State party is responsible for avoiding such periods of delay in its criminal justice system, and it is therefore culpable in this case. The author contends that the delay was aggravated by the fact that there was little investigation that had to be performed by the police, with one eyewitness providing direct testimony and three others providing circumstantial evidence. The only forensic evidence adduced at trial was a post-mortem examination report and certificate of blood sample analysis.

3.4 The author also alleges violations of articles 14, paragraphs 1, 3 (c) and 5, in the unreasonably protracted delay of over 4 years and 7 months which elapsed before the Court of Appeal heard and dismissed the author's appeal against conviction. The author cites a variety of cases in which the Committee found comparable delays (as well as shorter ones) to breach the Covenant.[5] The author states that a variety of approaches were made to the Registrar of the Court of Appeal, the Attorney-General and the Ministry of National Security and the Ombudsman. He states that by the time the appeal was heard, he had still not received the copies of depositions, notes of evidence and the trial judge's summing up he had requested. The author submits that in assessing the reasonableness of the delay it is relevant that he was under sentence of death, and detained throughout in unacceptable conditions.

3.5 The second portion of the complaint relates to the various conditions of detention described above which the author experienced pre-trial, post-conviction and, currently, post-commutation. These conditions are said to have been repeatedly condemned by international human rights organizations as breaching internationally accepted standards of minimum protection.[6] The author claims that after his commutation, he remains in conditions of detention in manifest violation of, inter alia, a variety of both domestic Prison Rules standards and United Nations Standard Minimum Rules for the Treatment of Prisoners.[7]

3.6 Relying on the Committee's General Comments 7 and 9 on articles 7 and 10,[8] respectively, and on a series of communications where conditions of detention were found to violate the Covenant,[9] the author argues that the conditions suffered by the author at each phase of the proceedings breached a minimum inviolable standard of detention conditions (to be observed regardless of a State party's level of development) and accordingly violated articles 7 and 10, paragraph 1. In particular, the author refers to the case of Estrella v. Uruguay,[10] where the Committee relied, in determining the existence of inhuman treatment at Libertad Prison, in part on "its consideration of other communications ... which confirms the existence of a practice of inhuman treatment at Libertad". In Neptune v. Trinidad and Tobago,[11] the Committee found circumstances very similar to the present case incompatible with article 10, paragraph 1, and called on the State party to improve the general conditions of detention in order to avoid similar violations in the future. The author underscores his claim of violation of articles 7 and 10, paragraph 1, by reference to a variety of international jurisprudence finding inappropriately severe conditions of detention to constitute inhuman treatment.[12]

3.7 Finally, the author alleges a violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3, in that he is being denied the right of access to court. The author submits that the right to present a constitutional motion is not effective in the circumstances of the present case, owing to the prohibitive cost of instituting proceedings in the High Court to obtain constitutional redress, the absence of legal aid for constitutional motions and the well-known dearth of local lawyers willing to represent applicants free of charge. The author cites the case of Champagnie et al. v. Jamaica[13] to the effect that in the absence of legal aid, a constitutional motion did not constitute an effective remedy for the indigent author in that case. The author cites jurisprudence of the European Court of Human Rights[14] for the proposition that effective right of access to a court may require the provision of legal aid for indigent applicants. The author submits this is particularly pertinent in a capital case, and thus argues the lack of legal aid for constitutional motions per se violates the Covenant.

The State party's observations on the admissibility and merits of the communication

4.1 By submission dated 6 September 1999, the State party responded contesting the admissibility and merits of the communication. As to the allegations of pre-trial delay and delay in hearing appeal, contrary to articles 9, paragraph 3, and 14, paragraphs 3 (c) and 5, the State party argues that prior to the communication the author did not seek to challenge the time periods elapsing in bringing the case to trial. The nature of the breach is such that the author was aware of a possible breach at the latest at the date of trial, but the issue was not raised at that point or on appeal. The State party argues that authors should not be allowed to sleep on their rights for an extended period, only years later to present allegations of breach to the Committee. Accordingly, it is not unreasonable to expect authors to seek redress by way of constitutional motion or application to the Committee at the time alleged breach occurs rather than years later, and this part of the communication should be declared inadmissible.

4.2 As to the merits of the claims of delay, the State party contends that neither of the relevant periods were unreasonable in the circumstances then prevailing in the State party in the years immediately following an attempted coup. The increase in crime placed great pressures on the courts in that period, with backlogs resulting. Difficulties experienced in the timely preparation of complete and accurate court records caused delays in bringing cases to trial and in hearing appeals. The State party states that it has implemented procedural reforms to avoid such delays, including the appointment of new judges at trial and appellate level. Increases in financial and other resources, including computer-aided transcription, have meant appeals are now being heard within a year of conviction. Regard should be paid to these improvements which have occurred.

4.3 As to the claims of inappropriate conditions of detention, in violation of articles 7 and 10, paragraph 1, the State party denies that the conditions under which the applicant was held when under sentence of death, and is now being held, violate the Covenant.[15] The State party refers to similar allegations made by others in respect of conditions at the same prison, which were held to be acceptable by the courts of the State party and which, on the information available, the Committee found itself not in a position to make a finding of violation on when the matter came before it.[16] The Privy Council, in the case of Thomas v. Baptiste,[17] found that unacceptable prison conditions in that case, which breached Prison Rules, did not necessarily sink to the level of inhuman treatment, and accepted the Court of Appeal's decision to that effect. The State party submits that these various findings in the courts of the State party, the Privy Council and the Committee should be preferred over the unsubstantiated and general submissions of the author.

4.4 As to the claim of a breach of the right in article 14, paragraph 1, to access to the courts, the State party denies any denial of access to the courts by way of constitutional motions to seek redress for breaches of fundamental rights. Nineteen condemned prisoners currently have constitutional motions before the courts, and so it is incorrect and misleading to suggest any breach of article 14, paragraph 1.

The author's comments on the State party's submissions

5.1 By submission dated 19 November 1999, the author responded to the State party's submissions. On the arguments regarding delay, the author points to a contradiction in the State party denying that unreasonable delay had occurred but pointing to commonplace problems in the administration of criminal justice during the relevant period. The author considers the State party to have conceded the various delays were unreasonable, as otherwise there would have been no need to make improvements to avoid such delays. The author also points to the Committee's decision in Smart v. Trinidad and Tobago[18] holding that a period of over two years from arrest until trial violated articles 9, paragraph 3, and 14, paragraph 3 (c).

5.2 The author contends that the issues of delay could not have been brought to the Committee at an earlier stage, because only with the Privy Council's denial of leave to appeal on 10 October 1996 were all available domestic remedies exhausted. The author also claims that, in any event, no constitutional remedy for the delays was available, as the Privy Council had determined in DPP v. Tokai[19] that the Constitution of Trinidad and Tobago, while providing a right to a fair trial, did not provide a right to a speedy trial or a trial within a reasonable time.

5.3 As to the claims of inappropriate conditions of detention, contrary to articles 7 and 10, paragraph 1, the author points out that the Privy Council's Thomas v. Baptiste decision relied on by the State party accepted that the appellants in that case were detained in cramped and foul-smelling cells and were deprived of exercise or access to open air for long periods. When exercising in fresh air they were handcuffed. The Privy Council, by a majority, held that these conditions were in breach of Prison Rules and unlawful, but not necessarily cruel and inhuman treatment, stating that value judgement depended on local conditions both in and outside the prison. It considered that, although the conditions were "completely unacceptable in a civilized society", the cause of human rights would not be served to set such demanding standards that breaches were common.

5.4 The author points out that, while the Privy Council majority accepted lesser standards on the basis that third world countries "often fall lamentably short of the minimum which would be acceptable in more affluent countries", the Committee has insisted on certain minimum standards of imprisonment that must always be observed irrespective of the country's level of development.[20] The author insists accordingly that a fundamental breach of irreducible minimum standards of treatment recognized among civilized nations does amount to cruel and inhuman treatment.

5.5 As to the claim of a right of access to the courts, the author relies on the Committee's admissibility decision in Smart v. Trinidad and Tobago[21] that, in the absence of legal aid being available to enable pursuit of a constitutional remedy, it could not be considered an effective remedy in the circumstances. The author questions how many of the 19 constitutional cases the State party refers to were granted legal aid, stating that he understands most were represented pro bono (cases not generally taken by local lawyers).[22]

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As to the author's allegations of delay, the Committee notes the State party's argument that domestic remedies have not been exhausted as (i) no issues of delay were raised at trial, or on appeal, and (ii) the author has not pursued a constitutional motion. The State party has not shown that raising issues of delay before the trial court or upon appeal could have provided an effective remedy. As to the State party's argument that a constitutional motion was and is available to the author, the Committee recalls its jurisprudence that for that remedy to be considered available to an indigent applicant, legal aid must be available. While the State party has supplied figures that this remedy is being exercised by other prisoners, the State party has failed to demonstrate that the remedy would be available to this particular author in the circumstances of indigency he raises. In any event, with respect to the claims of undue delay, the Committee notes that, according to the Privy Council's interpretation of the relevant constitutional provisions, there is no constitutional remedy available through which these allegations can be raised. The Committee finds therefore that it is not precluded under article 5, paragraph 2 (b), of the Optional Protocol from considering the communication.

6.3 As to the allegations concerning inappropriate conditions of detention in violation of articles 7 and 10, the Committee notes that the author has provided specific and detailed allegations on the conditions suffered by him in detention. Rather than responding to the individual allegations, the State party states simply that the author has not substantiated his allegations. In the circumstances, the Committee considers that the author has substantiated these claims sufficiently, for the purposes of admissibility.

7.1 Accordingly, the Committee finds the communication admissible and proceeds to an examination of the substance of those claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.2 As to the claim of unreasonable pre-trial delay, the Committee recalls its jurisprudence that "[i]n cases involving serious charges such as homicide or murder, and where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible".[23] In the present case, where the author was arrested on the day of the offence, charged with murder and held until trial, and where the factual evidence was straightforward and apparently required little police investigation, the Committee considers that substantial reasons must be shown to justify a 22-month delay until trial. The State party points only to general problems and instabilities following a coup attempt, and acknowledges delays that ensued. In the circumstances, the Committee concludes that the author's rights under article 9, paragraph 3 and article 14, paragraph 3 (c), have been violated.

7.3 As to the claim of a delay of over four years and seven months between conviction and the judgement on appeal, the Committee also recalls its jurisprudence that the rights contained in article 14, paragraphs 3 (c) and 5, read together, confer a right to a review of a decision at trial without delay.[24] In Johnson v. Jamaica,[25] the Committee established that, barring exceptional circumstances, a delay of four years and three months was unreasonably prolonged. In the present case, the State party has pointed again simply to the general situation, and implicitly accepted the excessiveness of the delay by explaining remedial measures taken to ensure appeals are now disposed of within a year. Accordingly, the Committee finds a violation of article 14, paragraphs 3 (c) and 5.

7.4 As to the author's claims that the conditions of detention in the various phases of his imprisonment violated articles 7 and 10, paragraph 1, the Committee notes the State party's general argument that the conditions in its prisons are consistent with the Covenant. In the absence of specific responses by the State party to the conditions of detention as described by the author,[26] however, the Committee must give due credence to the author's allegations as not having been properly refuted. As to whether the conditions as described violate the Covenant, the Committee notes the State party's arguments that its courts have, in other cases, found prison conditions in other cases satisfactory.[27] The Committee cannot regard the courts' findings on other occasions as answering the specific complaints made by the author in this instance. The Committee considers, as it has repeatedly found in respect of similar substantiated allegations,[28] that the author's conditions of detention as described violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider the claims arising under article 7.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 9, paragraph 3, 10, paragraph 1, and 14, paragraphs 3 (c) and 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Sextus with an effective remedy, including adequate compensation. The State party is also under an obligation to improve the present conditions of detention of the author, or to release him.

10. On becoming a State party to the Optional Protocol, Trinidad and Tobago recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with article 12 (2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant

to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Counsel's description of these conditions is derived from the author's correspondence and a personal visit by counsel to the author in custody in July 1996.

[2] On this date, after hearing argument, the Court refused leave to appeal and affirmed the conviction and sentence. The reasons for judgement (20 pages) were delivered shortly thereafter on 10 April 1995.

[3] Communications 56/1979, 6/1977 and 27/1978, respectively.

[4] [1994] 2 AC 1 (Privy Council).

[5] The author refers to Pinkney v. Canada (Communication 27/1978), Little v. Jamaica (Communication 283/1998), Pratt and Morgan v. Jamaica (Communications 210/1986 and 226/1987), Kelly v. Jamaica (Communication 253/1987) and Neptune v. Trinidad and Tobago (Communication 523/1992).

[6] The author refers to a general analysis of conditions in Port of Spain Prison described in Vivian Stern, *Deprived of their Liberty* (1990).

[7] The author also refers, in terms of the general situation, to a media quotation of 5 March 1995 of the General Secretary of the Prison Officers' Association to the effect that sanitary conditions are "highly deplorable, unacceptable and pose a health hazard". He also stated that limited resources and the spread of serious communicable diseases make a prison officer's job more harrowing.

[8] These General Comments have since been replaced by General Comments 20 and 21 respectively.

[9] Valentini de Bazzano v. Uruguay (Communication 5/1977), Buffo Carballal v. Uruguay (Communication 33/1978), Sendic Antonaccio v. Uruguay (Communication 63/1979), Gomez De Voituret v. Uruguay (Communication 109/1981), Wight v. Madagascar (Communication 115/1982), Pinto v. Trinidad and Tobago (Communication 232/1987), Mukong v. Cameroon (Communication 458/1991).

[10] Communication 27/1980.

[11] Communication 523/1992. The conditions described (and not contested by the State party) include a six foot by nine foot cell with six to nine fellow prisoners, with three beds, insufficient light, half an hour of exercise every two to three weeks and inedible food.

[12] In the European Court: Greek Case 12 YB 1 (1969) and Cyprus v. Turkey (Appln. No. 6780/74 and 6950/75); in the Supreme Court of Zimbabwe: Conjwayo v. Minister of Justice, Legal and Parliamentary Affairs et al. (1992) 2 SA 56, Gubay CJ for the Court.

[13] Communication 445/1991, declared admissible on 18 March 1993.

[14] Golder v. United Kingdom [1975] 1 EHRR 524 and Airey v. Ireland [1979] 2 EHRR 305. The author also cites the Committee's Views in Currie v. Jamaica (Communication 377/1989) to the effect that, where the interests of justice require, legal assistance should be available to a convicted applicant to pursue a constitutional motion in respect of irregularities in a criminal trial.

[15] The State party makes no reference to the conditions of detention pre-trial.

[16] See the majority view in Chadee v. Trinidad and Tobago (Communication 813/1998).

[17] [1999] 3 WLR 249.

[18] Communication 672/1995.

[19] [1996] 3 WLR 149.

[20] Mukong v. Cameroon (Communication 458/1991). The dissenting judgement of Lord Steyn in Thomas and Hilaire is to similar effect.

[21] Op. cit.

[22] The author states that where a death warrant has been read free legal representation is provided.

[23] Barroso v. Panama (Communication 473/1991, at 8.5).

[24] Lubuto v. Zambia (Communication 390/1990) and Neptune v. Trinidad and Tobago (Communication 523/1992).

[25] Communication 588/1994.

[26] In the case of Chadee v. Trinidad and Tobago (Communication 813/1998) which the State party refers to, the State party did provide details of fact and the Committee, by a majority, ultimately found itself not in a position to make a finding of a violation of article 10.

[27] These cases have interpreted a constitutional provision analogous in its terms to article 7 of the Covenant, and therefore might have bearing only upon the evaluation of the claims presently made under article 7 but not on the different standard contained in article 10.

[28] See, for example, Kelly v. Jamaica (Communication 253/1987) and Taylor v. Jamaica (Communication 707/1996).

APPENDIX

Individual opinion of Committee member Mr. Hipólito Solari Yrigoyen, in accordance with rule 98 of the rules of procedure:

I should like to express an individual opinion with regard to paragraph 9, which I believe should read:

> "In accordance with article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights, the State party is under an obligation to provide Mr. Sextus with an effective remedy, including adequate compensation. The State party is also under an obligation to release the author."

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

J. Communication No. 819/1998, Kavanagh v. Ireland (Views adopted on 4 April 2001, seventy-first session)*

Submitted by:	Mr. Joseph Kavanagh (represented by Mr. Michael Farrell)
Alleged victim:	The author
State party:	Ireland
Date of communication:	27 August 1998 (initial submission)
Date of decision on admissibility and adoption of Views:	4 April 2001

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 2001,

Having concluded its consideration of communication No. 819/1998 submitted to the Human Rights Committee by Joseph Kavanagh, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 27 August 1998, is Mr. Joseph Kavanagh, an Irish national, born 27 November 1957. The author alleges breaches by the Republic of Ireland of article 2, paragraphs 1 and 3 (a), article 4, paragraphs 1 and 3, article 14, paragraphs 1, 2 and 3, and article 26 of the Covenant. The Covenant and Optional Protocol entered into force for Ireland on 8 March 1990. The author is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of one individual opinion signed by five Committee members is appended to the present document.

Background

2.1 Article 38 (3) of the Irish Constitution provides for the establishment by law of Special Courts for the trial of offences in cases where it may be determined, according to law, that the ordinary courts are "inadequate to secure the effective administration of justice and the preservation of public peace and order". On 26 May 1972, the Government exercised its power to make a proclamation pursuant to Section 35 (2) of the *Offences Against the State Act 1939* (the Act) which led to the establishment of the Special Criminal Court for the trial of certain offences. Section 35 (4) and 5) of the Act provide that if at any time the Government or the Parliament is satisfied that the ordinary courts are again adequate to secure the effective administration of justice and the preservation of public peace and order, a rescinding proclamation or resolution, respectively, shall be made terminating the Special Criminal Court regime. To date, no such rescinding proclamation or resolution has been promulgated.

2.2 By virtue of section 47 (1) of the Act, a Special Criminal Court has jurisdiction over a "scheduled offence" (i.e. an offence specified in a list) where the Attorney-General "thinks proper" that a person so charged should be tried before the Special Criminal Court rather than the ordinary courts. The scope of "scheduled offence" is set out in the *Offences Against the State (Scheduled Offences) Order 1972* as encompassing offences under the *Malicious Damage Act, 1861*, the *Explosive Substances Act, 1883*, the *Firearms Acts, 1925-1971* and the *Offences against the State Act, 1939*. A further class of offences was added by Statutory Instrument later the same year, namely offences under section 7 of the *Conspiracy and Protection of Property Act* 1875. The Special Criminal Court also has jurisdiction over non-scheduled offences where the Attorney-General certifies, under section 47 (2) of the Act, that in his or her opinion the ordinary courts are "inadequate to secure the effective administration of justice in relation to the trial of such person on such charge". The Director of Public Prosecutions (DPP) exercises these powers of the Attorney-General by delegated authority.

2.3 In contrast to the ordinary courts of criminal jurisdiction, which employ juries, Special Criminal Courts consist of three judges who reach a decision by majority vote. The Special Criminal Court also utilizes a procedure different from that of the ordinary criminal courts, including that an accused cannot avail himself or herself of preliminary examination procedures concerning the evidence of certain witnesses.

The facts as presented

3.1 On 2 November 1993, a serious and apparently highly-organized incident took place in which the chief executive of an Irish banking company, his wife, three children and a baby-sitter were detained and assaulted in the family home by a gang of seven members. The chief executive was thereafter induced, by threat of violence, to steal a very large amount of money from the bank concerned. The author admits having been involved in this incident, but contends that he himself had also been kidnapped by the gang prior to the incident and acted under duress and threat of violence to himself and his family.

3.2 On 19 July 1994, the author was arrested on seven charges related to the incident; namely false imprisonment, robbery, demanding money with menaces, conspiracy to demand money with menaces, and possession of a firearm with intent to commit the offence of false imprisonment. Six of those charges were non-scheduled offences, and the seventh charge (possession of a firearm with intent to commit the offence of false imprisonment) was a "scheduled offence".

3.3 On 20 July 1994 the author was charged directly before the Special Criminal Court with all seven offences by order of the Director of Public Prosecution (DPP), dated 15 July 1994, pursuant to section 47 (1) and (2) of the Act, for the scheduled offences and the non-scheduled offences respectively.

3.4 On 14 November 1994, the author sought leave from the High Court to apply for judicial review of the DPP's order. The High Court granted leave that same day and the author had his application heard in June 1995. The author contended that the offences with which he was charged had no subversive or paramilitary connection and that the ordinary courts were adequate to try him. The author challenged the 1972 proclamation on the basis that there was no longer a reasonably plausible factual basis for the opinion on which it was grounded, and sought a declaration to that effect. He also sought to quash the DPP's certification in respect of the non-scheduled offences, on the grounds that the DPP was not entitled to certify non-scheduled offences for trial in the Special Criminal Court if they did not have a subversive connection. In this connection, he contended that the Attorney-General's representation to the Human Rights Committee at its forty-eighth session that the Special Criminal Court was necessitated by the ongoing campaign in relation to Northern Ireland gave rise to a legitimate expectation that only offences connected with Northern Ireland would be put before the Court. He further contended that the decision to try him before the Special Criminal Court constituted unfair discrimination against him.

3.5 On 6 October 1995, the High Court rejected all of the author's arguments. The Court held, following earlier authority, that the decisions of the DPP were not reviewable in the absence of evidence of mala fides, or that the DPP had been influenced by improper motive or policy. In the Court's view, certifying non-scheduled offences of a non-subversive or non-paramilitary nature would not be improper. The Court concluded that a proper and valid decision was reasonably possible, and the certification was upheld. As regards the underlying attack upon the 1972 proclamation itself, the High Court considered that it was limited to examining the constitutionality of the Government's action in 1972 and the Court could not express a view on the Government's ongoing obligation under section 35 (4) to end the special regime. The High Court considered that for it to presume to quash the proclamation would be to usurp the legislative role in an area in which the courts had no role.

3.6 Concerning the contention that the author was subject to a mode of trial different from those charged with similar offences but who were not certified for trial before the Special Criminal Court, the High Court found that the author had not established that such a difference in treatment was invidious. Finally the High Court held that no utterance by a representative of the State before an international committee could alter the effect of a valid law or tie the discretion of the DPP exercised pursuant to that law.

3.7 On 24 October 1995, the author appealed to the Supreme Court. In particular, the author contended that the 1972 proclamation was intended to deal with subversive offences and the remit of the Special Criminal Court was never intended to encompass "ordinary crime". It was further argued that the Government was under a duty to review and revoke the proclamation as soon as it was satisfied that the ordinary courts were effective to secure the effective administration of justice and the preservation of public peace and order.

3.8 On 18 December 1996, the Supreme Court dismissed the author's appeal from the decision of the High Court. The Supreme Court held that the Government's decision in 1972 to issue the proclamation was essentially a political decision, and was entitled to a presumption of constitutionality which had not been rebutted. The Supreme Court held that both Government and Parliament were under a duty under section 35 of the Act to repeal the regime as soon as they were satisfied that the ordinary courts were again adequate for their tasks. Although the existence of the Special Criminal Court could in principle be judicially reviewed, the Supreme Court considered that it had not been shown that maintenance of the regime amounted to an invasion of constitutional rights in the light of evidence that the situation was being kept under review and the Government remained satisfied as to its need.

3.9 Following its earlier jurisprudence in The People (Director of Public Prosecutions) v. Quilligan,[1] the Supreme Court considered that the Act also allowed for the trial of "non-subversive" offences by the Special Criminal Court, if the DPP was of the view that the ordinary courts were inadequate. With the dismissal of the appeal, the author claims therewith to have exhausted all possible domestic remedies within the Irish justice system in respect of these issues.

3.10 After denial of a series of bail applications, the author's trial before the Special Criminal Court commenced on 14 October 1997. On 29 October 1997, he was convicted of robbery, possession of a firearm, to wit a handgun, with intent to commit an indictable offence, namely false imprisonment, and demanding cash with menaces with intent to steal. The author was sentenced to terms of imprisonment of 12, 12 and 5 years respectively, backdated to run concurrently from 20 July 1994 (the date from which the author was in custody). On 18 May 1999, the Court of Criminal Appeal dismissed the author's application for leave to appeal against his conviction.

The complaint

4.1 The author claims that the DPP's order to try him before the Special Criminal Court violated the principles of fairness and full equality of arms protected by article 14, paragraphs 1 and 3. The author complains that he has been seriously disadvantaged compared to other persons accused of similar or equal criminal offences, who unlike him were tried by ordinary courts and therefore could avail themselves of a wider range of possible safeguards. The author emphasizes that in his case the trial by jury, as well as the possibility of preliminary examinations of witnesses, would be particularly important. The assessment of the credibility of several key witnesses would be the main issue of his case. Thus the author alleges to have been arbitrarily restrained and unequally treated in his procedural rights, since the DPP has not given any reasons or justification for his decision.

4.2 The author accepts that the right to be tried by jury and preliminarily to examine witnesses are not explicitly listed in article 14, paragraph 3, but states that the requirements of article 14, paragraph 3, only set out some but not always all requirements of fairness. He argues that the clear intention of the article as a whole is to provide significant safeguards that are equally available to all. The author argues accordingly that these rights, which he states are key safeguards in the State party's jurisdiction, equally are protected by article 14.

4.3 The author further complains that the decision of the DPP pursuant to secion 47 of the Act was issued without any reason or justification and thereby violated the guarantee of article 14, paragraph 1, to a public hearing. The State party's highest court, the Supreme Court, had held in H v. Director of Public Prosecutions[2] that the DPP cannot be compelled to give reasons for the decision, short of exceptional circumstances such as mala fides being shown. The author claims that a crucial decision in relation to his trial, namely the choice of procedure and forum, was made in secret and on the basis of considerations which were not revealed to him or to the public and which therefore were not open to any rebuttal.

4.4 Furthermore, the author alleges that the decision of the DPP violated the presumption of innocence protected by article 14, paragraph 2. He considers that the re-installation of the Special Criminal Court by the Irish Government in 1972 was due to growing violence in Northern Ireland, with the intention to better insulate juries from improper influence and external interference. The author argues that the decision of the DPP involves a determination either that the author is a member of, or is associated with, a paramilitary or subversive group involved in the Northern Ireland conflict, or that he, or persons associated with him, are likely to attempt to interfere with or otherwise influence a jury if tried before an ordinary court. He also states that being detained until trial in these circumstances also involves a determination of some measure of guilt.

4.5 The author denies that he is, or ever was, associated with any paramilitary or subversive group. He argues that the decision of the DPP in his case therefore implies that he would have to be associated with the criminal gang responsible for the abduction on 2 November 1993, which would be likely to interfere with, or otherwise influence, the decision of a jury. The author denies his involvement in the criminal gang, which he sees as the main issue to be solved in the trial and which therefore could not be decided upon by the DPP in advance.

4.6 The author argues that the State party has failed to provide an effective remedy, as required by article 2. In the circumstances of his case, a decision raising clear issues under the Covenant has been made and is not subject to effective judicial remedy. With the Courts tying their own hands and restricting their scrutiny to exceptional, and almost impossible to demonstrate, reasons of mala fides, improper motives or considerations on the part of the DPP, it could not be said that an effective remedy existed. As the author does not contend any such exceptional circumstances exist, no remedy is available to him.

4.7 The author also alleges a violation of the principle of non-discrimination under article 26, since he has been deprived, without objective reason, of important legal safeguards available to other accused persons charged with similar offences. In this regard, the author argues that the 1972 proclamation of the Irish Government re-establishing the Special Criminal Court is a derogation pursuant to article 4, paragraph 1, of certain rights protected by article 14 of the Covenant. He states that the situation of growing violence in Northern Ireland leading to the Government's decision has ceased and can no longer be characterized as a public emergency which threatens the life of the nation. The author argues that the continuing derogation from parts of the Covenant would therefore no longer be required. By maintaining the Special Criminal Court in existence, Ireland would be in violation of its obligations under article 4, paragraph 1.

4.8 Finally, the author alleges that Ireland has also breached its obligation under article 4, paragraph 3. He claims that by not renouncing its proclamation of 1972, Ireland has, at least by now, de facto or informally derogated from article 14 of the Covenant without notifying the other State parties to the Covenant as required.

The State party's observations with regard to the admissibility of the communication

5.1 The State party argues that the communication should be considered inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies. At the time of submission, the author had not prosecuted his appeal against conviction to the Court of Criminal Appeal. The State party also argues that aspects of the present complaint had not been brought before the local courts at all. The State party contends that the author never argued in the domestic courts that he did not receive a public hearing, or that his constitutional right to be presumed innocent had been violated. The State therefore argues that those aspects are inadmissible. Annexed to its submissions, the State party does provide a 1995 decision of its highest court, the Supreme Court, which held that the DPP decision did not violate the presumption of innocence.[3] (In subsequent submissions, the State party admits that the issue of presumption of innocence was raised at both levels in the judicial review proceedings.)

5.2 The State party also argues at length that the author has enjoyed the full protection of the Covenant in relation to his arrest, detention, the charges against him and his trial. It further argues that various portions of the Covenant are inapplicable to the complaints, that the complaints are incompatible with the provisions of the Covenant, and that the complaints are insufficiently substantiated.

Author's comments on the State party's submissions on admissibility

6. In addition to responding to the State party's arguments on substantiation and applicability of the Covenant, the author comments on the exhaustion of domestic remedies. He indicates that he was pursuing an appeal against conviction and that such an appeal deals only with the evidence given at trial and the inferences to be drawn therefrom. He argues that the issues raised concerning the DPP certification and his unequal and unfair treatment were fully litigated, prior to his trial, all the way to the Supreme Court. In response to the State party's contentions that failure to receive a "public" hearing and breach of the presumption of innocence were not raised before the domestic courts, the author declares that the substance of these claims was fully argued throughout the judicial review proceedings.

The State party's observations with regard to the merits of the communication

7.1 The State party declares that its Constitution specifically permits the creation of special courts as prescribed by law. The State party notes that, following the introduction of a regular government review and assessment procedure on 14 January 1997, reviews taking into account the views of the relevant State agencies were carried out on 11 February 1997, 24 March 1998, and 14 April 1999, have concluded that the continuance of the Court was necessary, not only in view of the continuing threat to State security posed by instances of violence, but also of the particular threat to the administration of justice, including jury intimidation, from the rise of organized and ruthless criminal gangs, principally involved in drug-related and violent crime.

7.2 The State party submits that the Special Criminal Court regime satisfies all the criteria set out in article 14 of the Covenant. The State party notes that neither article 14, nor the Committee's General Comment on article 14, nor other international standards require trial by jury or a preliminary hearing where witnesses could be examined under oath. The requirement, rather, is simply that the trial be fair. The absence of either or both of those elements does not, of itself, make a hearing unfair. Within many States, different trial systems may exist, and the mere availability of different mechanisms cannot of itself be regarded as a breach.

7.3 As to the author's allegation that his inability to examine witnesses preliminarily under oath violates article 14 guarantees of fair trial, the State party emphasizes that the parties were placed in the identical position, and therefore on an equal and level footing at the hearing. In any event, such a preliminary hearing serves simply to raise likely issues for cross-examination at trial and has no impact on the trial itself.

7.4 Concerning the author's argument that his rights were breached in that he was tried by a Special Criminal Court on "ordinary" criminal charges, the State party argues that the proper administration of justice must be protected from threats which undermine it, including threats arising from subversive groups within society, from organized crime and the dangers of intimidation of jurors. In a case where such a threat to the integrity of the normal jury process exists, as the DPP had certified here, the accused's rights are in fact better protected by a bench of three impartial judges who are less vulnerable to improper external influence than a jury would be. The State party points out that an inadequacy of the ordinary courts, as to which the DPP must be satisfied before the Special Criminal Court can be invoked, may arise not merely from "political", "subversive" or paramilitary offences but also from "ordinary gangsterism or well financed and well organized drug dealing, or other situations where it might be believed that juries were for some corrupt reason, or by virtue of threats, or of illegal interference, being prevented from doing justice".[4] The author's contention that his offence was not "political" as such is therefore not a bar to the Special Criminal Court being invoked.

7.5 The State party argues that the author was also afforded all the rights contained in article 14, paragraph 3, of the Covenant. These rights are enjoyed by all persons before an ordinary criminal court in Ireland, but also by all before the Special Criminal Court pursuant to section 47 of the 1939 Act.

7.6 Concerning the author's allegation that he did not have a "public" hearing as guaranteed by article 14, paragraph 1, because the DPP was not required to, and did not, give reasons for the decision certifying the ordinary courts as inadequate, the State party argues that the entitlement to a public hearing applies to the court proceedings, which in the Special Criminal Court too at all stages and at all levels were conducted openly and publicly. The right to a public hearing does not extend to the DPP's pre-trial decisions. Nor would it be desirable to require the DPP's decision to be justified or explained, for that would open up enquiries into information of a confidential nature with security implications, would nullify the very purpose for which the Special Criminal Court was established and would not be in the overall public interest.

7.7 Regarding the author's allegation that his right to be presumed innocent in accordance with article 14, paragraph 2, was violated, the State party asserts that this presumption is a fundamental principle enshrined in Irish law, to which the Special Criminal Court must and does adhere. The same burden of proof must be discharged in the Special Criminal Courts as in the ordinary criminal courts, that is, proof of guilt beyond all reasonable doubt. If this burden was not met, the author would therefore be entitled to an acquittal.

7.8 The State party notes that the accused successfully challenged one offence at the commencement of trial, was acquitted in respect of three offences, and was convicted with respect to a further three. More generally, the State party observes that of 152 persons indicted before the Special Criminal Court between 1992 and 1998, 48 pleaded guilty, 72 were convicted, 15 were acquitted and 17 had nolle prosequi entered. With respect to the author's trial, the issue was raised before the Court of Criminal Appeal, which held that, on the totality of evidence, the presumption of innocence had not been violated.

7.9 The State party argues that, given that these elements as a whole demonstrate that the process applied by the Special Criminal Court process is fair and consistent with article 14 of the Covenant, the DPP's decision to try the author before that Court cannot be a violation of article 14.

7.10 As to the author's allegations concerning unequal and arbitrary treatment contrary to article 26, the State party contends that all persons are treated alike under the statutory regime set up in the Act. All persons are equally subject to the DPP's assessment that the ordinary courts may not be adequate to secure the effective administration of justice and the preservation of public peace and order. Further, the author was treated identically to anyone else whose case had been certified by the DPP. Even if the Committee regards a distinction to have been made between the author and other persons accused of similar or equally serious offences, reasonable and objective criteria are applied in all cases, namely that the ordinary courts had been assessed as being inadequate in the particular case.

7.11 The State party claims, contrary to the author's assertion, that its police authorities believe that the author *was* a member of an organized criminal group, and points to the gravity of the crimes, the highly planned nature of the criminal operation, and the brutality of the offences. Even though the author was in custody before trial, a risk of jury intimidation from other members of the gang could not be excluded. Nothing has been supplied to suggest that this assessment by the DPP was taken in bad faith, directed by improper motive or policy, or was otherwise arbitrary.

7.12 Finally, as to the author's allegations that the State party has not provided an effective remedy for violations of rights as required by article 2, the State party observes that its Constitution guarantees extensive rights to individuals and that a number of violations were alleged by the author and pursued in the courts, through to the highest court in the land. The courts fully addressed the issues placed before them by the author, accepting some of the author's contentions and rejecting others.

7.13 The State party also rejects as misplaced the author's argument that it is derogating, de facto or informally, from the Covenant, pursuant to article 4. The State party argues that article 4 permits derogation in certain circumstances, but the State is not invoking that right here and it is not applicable.

The author's comments upon the State party's observations with regard to the merits of the communication

8.1 In response to the State party's argument that there could have been a risk of jury or witness intimidation from other members of the gang, supporting the DPP's decision to try the author before the Special Criminal Court, the author states that at no time has the State party disclosed the DPP's reasons for that decision. Moreover, the DPP never argued at any bail application that there existed a risk of intimidation by the author. In any event, for the DPP to decide that the author or others in the gang would engage in such conduct - if indeed that was the reason for the decision - would be for the DPP to prejudge the outcome of the trial. Nor was the author given any opportunity to rebut the DPP's assumption.

8.2 Concerning the State party's assertion that the author was indeed a member of an organized criminal group, the author takes strong exception, observing that this is the first occasion the State party has ever made such an assertion. Indeed, at a bail application to the court the police specifically disclaimed any such link, and, during trial, no evidence to that effect was adduced beyond the evidence of participation in the offences themselves. In any event, the State party does not state whether this was the reason for the DPP's decision; if it was, that decision prejudged what was a trial issue.

8.3 Regarding the State party's specific submissions on article 14, the author points out the Committee's observation in its General Comment No. 13 that the requirements of paragraph 3 of article 14 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of hearing guaranteed by paragraph 1.

8.4 With regard to the Government reviews of the Special Criminal Court carried out in February 1997, March 1998 and April 1999, the author observes that these reviews were unannounced, that no input was invited from the public, NGOs or professional bodies, and that no information was given about who carried out the reviews or the detailed reasons why the Government decided that the Court remained necessary. Accordingly, the author argues that the reviews appear to be purely internal, with no independent content, and thus of no real value as a safeguard.

8.5 Regarding the State party's contention that the Court remains necessary due, inter alia, to the rise of highly organized criminal gangs, often involved in drug and violent crime, the author points out that the 1972 proclamation was clearly issued in the context of "politically-inspired violence" and that successive Government statements, including some made to the European Court of Human Rights in 1980 and the Human Rights Committee in 1993,[5] confirm this. No other reason for the Court's establishment could have existed. Any threat from modern criminal gangs is outside the scope of the 1972 proclamation, and a new proclamation would be needed to deal with that threat. In any event, many cases involving drug dealing and violence by gangs are dealt with in ordinary courts, and there is no apparent reason why the author's case was treated differently from those others.

8.6 The author rejects the State party's contention that he was not disadvantaged by being denied a preliminary examination, as the prosecution was in the same position. The author states that the prosecution was able to deprive the author of that right, and did so after having already seen and interviewed the relevant witnesses, but the author was not able to deprive the prosecution of that right to a preliminary examination. Therefore, the author contends, there was no equality of arms.

8.7 Concerning the State party's assertion that there had been a "fair and public hearing", the author states that he does not argue that the trial proceedings themselves were not public, but that the DPP's decision, which was an integral and essential part of the determination of the charges, was not public. Nor was that hearing fair, for neither notice nor reasons were given, and there was no opportunity for rebuttal. Citing various decisions of the European Court of Human Rights[6] which suggest that effective judicial review of decisions cannot be entirely negated by the invocation of security concerns, the author argues that in this case there was no real avenue for effective independent review. The courts had strictly limited their jurisdiction to examine the DPP's decisions.

8.8 As to the right to a be presumed innocent, the author argues that the DPP's decision to send him for trial before the Special Criminal Court was a part of the determination of the charges and that the DPP also is bound by this presumption. The DPP's decision, according to the author, effectively determined that the author was involved in a subversive organization or was a member of the gang carrying out the kidnapping. The author argues that being sent for trial in the Special Criminal Court sent a signal to the Court that he was part of a dangerous criminal gang, and it is difficult to believe this factor had no influence on the outcome.

8.9 In response to the State party's arguments on equal treatment before the law, the author argues that the State party's contention that he was treated the same way as are others charged before the Special Criminal Courts, only means that he was treated in the same way as the small number of others who were tried before the Special Criminal Court but not like the majority of persons charged with similar offences, who were tried before the ordinary courts. In any event, most of the other 18 persons tried by special courts were charged with subversive-type offences. He was singled out to join this small group with no reasons given and with no effective means of challenging the decision to do so.

8.10 As to whether such differentiation is objective, reasonable and in pursuit of a legitimate aim under the Covenant, the author questions whether the continued use of the Court was appropriate in view of the sharp drop of paramilitary violence. Even if these procedures are a proportionate response to subversive activity, which the author does not concede, the question arises whether it is a legitimate response to non-subversive activity. The author argues that is impossible to determine whether the differentiation is reasonable and since the DPP's criteria are unknown and the DPP was responsible for the prosecution.

8.11 As to the State party's argument that it was not relying on its right to derogate from the provisions of the Covenant under article 4, the author submits that, while the State party had not declared any state of emergency, the 1972 proclamation establishing the Special Criminal Court in effect introduced a measure appropriate only in an emergency. The author states that the condition for permissibility of such a measure - that is, a threat to the life of the nation - did not exist then and does not now. In any case, if the State party disclaims reliance on article 4, it cannot seek to justify its conduct under the exceptions there provided for.

Issues and proceedings before the Committee

9.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

9.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 As to the State party's contention that available domestic remedies have not been exhausted, the Committee notes that the pre-trial litigation on the DPP's decision was pursued through to the Supreme Court. Moreover, the author's appeal against conviction, raising trial issues affected by the DPP's decision, was rejected by the Court of Criminal Appeal. A complainant bringing the issues in question before the domestic courts need not use the precise language of the Covenant, for legal remedies differ in their form from State to State. The question is rather whether the proceedings in their totality raised facts and issues presently before the Committee. In the light of these proceedings, other controlling authority from the State party's courts and the absence of any suggestion that there are additional remedies available, the Committee accordingly finds that it is not precluded under article 5, paragraph 2 (b), of the Optional Protocol from considering the communication.

9.4 With respect to the author's claims under article 2, the Committee considers that the author's contentions in this regard do not raise issues additional to those considered under other articles invoked, which are considered below. With respect to the alleged violation of article 4, the Committee notes that the State party has not sought to invoke that article.

9.5 As to the State party's remaining arguments on admissibility, the Committee is of the view that these arguments are intimately linked with issues on the merits and cannot meaningfully be severed from a full examination of the facts and arguments presented. The Committee finds the communication admissible as far as it raises issues under articles 14 and 26 of the Covenant.

Consideration of the merits

10.1 The author claims a violation of article 14, paragraph 1, of the Covenant, in that, by subjecting him to a Special Criminal Court which did not afford him a jury trial and the right to examine witnesses at a preliminary stage, he was not afforded a fair trial. The author accepts that neither jury trial nor preliminary examination is in itself required by the Covenant, and that the absence of either or both of these elements does not necessarily render a trial unfair, but he claims that all of the circumstances of his trial before a Special Criminal Court rendered his trial unfair. In the Committee's view, trial before courts other than the ordinary courts is not necessarily, per se, a violation of the entitlement to a fair hearing and the facts of the present case do not show that there has been such a violation.

10.2 The author's claim that there has been a violation of the requirement of equality before the courts and tribunals, contained in article 14, paragraph 1, parallels his claim of violation of his right under article 26 to equality before the law and to the equal protection of the law. The DPP's decision to charge the author before the Special Criminal Court resulted in the author facing an extra-ordinary trial procedure before an extra-ordinarily constituted court. This distinction deprived the author of certain procedures under domestic law, distinguishing the author from others charged with similar offences in the ordinary courts. Within the jurisdiction of the State party, trial by jury in particular is considered an important protection, generally available to accused persons. Under article 26, the State party is therefore required to demonstrate that such a decision to try a person by another procedure was based upon reasonable and objective grounds. In this regard, the Committee notes that the State party's law, in the *Offences Against the State Act*, sets out a number of specific offences which can be tried before a Special Criminal Court at the DPP's option. It provides also that any other offence may be tried before a Special Criminal Court if the DPP is of the view that the ordinary courts are "inadequate to secure the effective administration of justice". The Committee regards it as problematic that, even assuming that a truncated criminal system for certain serious offences is acceptable so long as it is fair, Parliament through legislation set out specific serious offences that were to come within the Special Criminal Court's jurisdiction in the DPP's unfettered discretion ("thinks proper"), and goes on to allow, as in the author's case, any other offences also to be so tried if the DPP considers the ordinary courts inadequate. No reasons are required to be given for the decisions that the Special Criminal Court would be "proper", or that the ordinary courts are "inadequate", and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances.

10.3 The Committee considers that the State party has failed to demonstrate that the decision to try the author before the Special Criminal Court was based upon reasonable and objective grounds. Accordingly, the Committee concludes that the author's right under article 26 to equality before the law and to the equal protection of the law has been violated. In view of this finding with regard to article 26, it is unnecessary in this case to examine the issue of violation of equality "before the courts and tribunals" contained in article 14, paragraph 1, of the Covenant.

10.4 The author contends that his right to a public hearing under article 14, paragraph 1, was violated in that he was not heard by the DPP on the decision to convene a Special Criminal Court. The Committee considers that the right to public hearing applies to the trial. It does not apply to pre-trial decisions made by prosecutors and public authorities. It is not disputed that the author's trial and appeal were openly and publicly conducted. The Committee therefore is of the view that there was no violation of the right to a public hearing. The Committee considers also that the decision to try the author before the Special Criminal Court did not, of itself, violate the presumption of innocence contained in article 14, paragraph 2.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The State party is also under an obligation to ensure that similar violations do not occur in the future: it should ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided.

13. Bearing in mind that, by becoming a party to the Optional Protocol, Ireland has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive, within ninety days, information from the Government of Ireland about the measures taken to give effect to the Committee's Views. The State party is requested also to give wide publicity to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] [1986] I.R. 495.

[2] [1994] 2 I.R. 589.

[3] O'Leary v. Attorney-General [1995] 1 I.R. 254.

[4] Supreme Court, People (DPP) v. Quilligan [1986] I.R. 495, 510.

[5] Upon the consideration of the State party's initial periodic report, the State party's Attorney-General stated to the Committee that the Special Criminal Court "was needed to ensure the fundamental rights of citizens and protect democracy and the rule of law from the ongoing campaign related to the problem of Northern Ireland". The State party registered the same point in its submissions in Holland v. Ireland. (Communication 593/1994, declared inadmissible on 25 October 1996, CCPR/C/58/D/593/1994.)

[6] Tinnelly v. United Kingdom (Case 62/1997/846/1052-3), Chahal v. United Kingdom (Case 70/1995/576/662) and Fitt v. United Kingdom (Appln. No. 29777/96, decided 16 February 2000).

APPENDIX

Individual opinion of Committee members Louis Henkin, Rajsoomer Lallah, Cecilia Medina Quiroga, Ahmed Tawfik Khalil and Patrick Vella

1. While the complaint of the author can be viewed in the perspective of article 26 under which States are bound, in their legislative, judicial and executive behaviour, to ensure that everyone is treated equally and in a non-discriminatory manner, unless otherwise justified on reasonable and objective criteria, we are of the view that there has also been a violation of the principle of equality enshrined in article 14, paragraph 1, of the Covenant.

2. Article 14, paragraph 1, of the Covenant, in its very first sentence, entrenches the principle of equality in the judicial system itself. That principle goes beyond and is additional to the principles consecrated in the other paragraphs of article 14 governing the fairness of trials, proof of guilt, procedural and evidential safeguards, rights of appeal and review and, finally, the prohibition against double jeopardy. That principle of equality is violated where all persons accused of committing the very same offence are not tried by the normal courts having jurisdiction in the matter, but are tried by a special court at the discretion of the Executive. This remains so whether the exercise of discretion by the Executive is or is not reviewable by the courts.

(Signed) Louis Henkin

(Signed) Rajsoomer Lallah

(Signed) Cecilia Medina Quiroga

(Signed) Ahmed Tawfik Khalil

(Signed) Patrick Vella

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

K. Communication No. 821/1998, Chongwe v. Zambia (Views adopted on 25 October 2000, seventieth session)*

Submitted by:	Mr. Rodger Chongwe
Alleged victim:	The author
State party:	Zambia
Date of communication:	7 November 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2000,

Having concluded its consideration of communication No. 821/1998 submitted to the Human Rights Committee by Mr. Rodger Chongwe under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into consideration all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Rodger Chongwe, born on 2 October 1938, a citizen of Zambia. He claims to be victim of the violation of his rights under articles 6 and 14 of the International Covenant for Civil and Political Rights by Zambia, and raises the issue of security of person, which may be considered in relation to article 9.

Facts as submitted by the author

2.1 The author, a Zambian advocate and chairman of a 13-party opposition alliance, states that in the afternoon of 23 August 1997, he and Dr. Kenneth Kaunda, for 27 years the President of Zambia, were shot and wounded by the police. The author states that the incident occurred in

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* The following members of the Committee participated in the examination of the case: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

Kabwe, a town some 170 kilometres north of Lusaka, while the author and Dr. Kaunda were to attend a major political rally to launch a civil disobedience campaign. He annexes reports by Human Rights Watch and Inter-African Network for Human Rights and Development as part of his communication.

2.2 The author states that the police fired on the vehicle on which he was travelling, slightly wounding former President Kaunda and inflicting a life threatening wound on the author. The police force subsequently promised to undertake its own investigation. The Zambian Human Rights Commission was also said to be investigating the incident; but no results of any investigations have been produced.

2.3 He further refers to the Human Rights Watch Report for May 1998, Vol. 10, No. 2 (A), titled "Zambia, no model for democracy" which includes 10 pages on the so-called "Kabwe shooting", confirming the shooting incident that took place by quoting witness statements and medical reports.

2.4 The report refers to the incident as follows:

> "... *When Kaunda and the Alliance leader Rodger Chongwe decided to leave by car, police attacked the car with tear gas and later live ammunition, possibly to try to stop their exit. According to eyewitnesses no warning was given before shots were heard. A small number of police that day were carrying AK-47s, and senior officers had revolvers and a few G-3s were held by mobile unit members. Most of the police were issued only batons and tear gas* ... "

2.5 In a referred interview with the Human Rights Watch, Kaunda's driver, Nelson Chimanga stated:

> "... *They (the police) fired tear gas at the car, one came into the car because I had opened a window to let out the smoke. When we got out of the smoke, I had to swerve past a police vehicle that tried to block our escape; just before the roundabout, I had to swerve to avoid a second vehicle blocking the road and then a third that was across the road. It was after this vehicle that we heard the bullet. Suddenly Rodger Chongwe was bleeding next to me. We gave him first aid in the vehicle, but because he was bleeding so much, did a U-turn and returned to Kabwe General Hospital. Because of heavy paramilitary police presence I moved the vehicle around the back and we left for Lusaka at around 0300 hrs.*"

2.6 Former President Kenneth Kaunda described the incident as follows:

> "*A bullet fired by the Zambian police grazed the top of my head. The same bullet much more seriously injured Dr Chongwe* ...

> *It was then the police opened up with live ammunition. A bullet grazed my head and struck Dr Chongwe who was sitting in the front seat, below the right ear. My aide Anthony Mumbi was also slightly injured by shrapnel. I probably would have died except my bodyguard Duncan Mtonga, pushed me to the side when he heard the gun shots. I did not hear them."*

2.7 One of the passengers in the vehicle, was the United Independence Party (UNIP)'s legal officer, Mwangala Zaloumis, who provided Human Rights Watch with a written statement dated 4 September 1997:

> *"... The vehicle was blocked three times in three different places by police vehicles. At about 200 meters from the Party Offices the presidential (Secretary's note: the former president's car) vehicle was fired at and at the same time tear gas was fired into the vehicle because the windows were open due to earlier firing of tear gas around at the bottom of the vehicle. There was a lot of confusion in the vehicle as a result of tear gas smoke. The next thing we saw was blood all over. Dr Chongwe had been hit on the cheek and was bleeding profusely. One of the security personnel who sat next to me was also bleeding. He had been hit by the shrapnel in three different places ..."*

2.8 According to the Human Rights Watch report, President Chiluba on 26 August 1997, denied that the Kabwe shooting was a State-sponsored assassination plot. He said that the Zambian police had instigated an investigation and that Nungu Sassasali, the commanding officer at Kabwe, was suspended. However, he rejected calls for an independent inquiry into the incident. The report refers to the ZNBC radio, stating that on 28 August, President Chiluba said the Government would not apologize over the Kabwe shooting as it could not be held responsible for it.

2.9 According to the said report quoting the Zambia Daily Mail, Home Affairs Minister Chitalu Sampa on 31 August stated:

> *" We have been told that the bullet hit Dr Kaunda on the head, the same bullet went through Dr. Chongwe's cheek, the same bullet again hit the other person in the neck. Honestly, how can that be possible, so we can not conclusively say they were shot by the police."*

Further, President Chiluba on 13 November, stated that:

> *"These two people were not shot. An AK 47 cannot leave a simple wound. Let them prove that they were (shot)."*

The President then admitted that police fired in the air as they tried to break up the opposition rally.

2.10 The author states that he was admitted to the Kabwe hospital immediately after the shooting incident. The Human Rights Watch report, cites a medical report by the Kabwe Hospital to the Permanent Secretary, Ministry of Health, Lusaka, stating:

> *"Local examination revealed puncture wound on the right cheek communicating with a bleeding, open wound on the upper aspect of the neck."*

Furthermore, a medical report from St John of God Hospital in Australia, where the author took refuge, dated 3 October 1997, states that:

> *"A small metallic foreign body can be seen in the soft tissue beneath the skull base close to the skin surface consistent with the history of a gunshot wound ... A small metallic fragment is noted in the soft tissues in the posterior aspect of the upper cervical region close to the skin surface ..."*

2.11 Human Rights Watch report that they showed the medical reports, photographs, and the Human Rights Commission video to Dr Richard Shepard of the Forensic Medicine Unit, St George's Hospital Medical School, London, for an expert assessment. Dr Shepard concluded as follows:

> *"From evidence that I've seen one can say for sure that a bullet hit the vehicle and then as it entered sprayed fragments throughout the vehicle, a bit like an angry swarm of bees. The injuries sustained by Kaunda, Chongwe and Kaunda's aide all are consistent with this. Rodger Chongwe is lucky to be alive. If the shrapnel had hit him a couple of inches to the left he would have been dead. The trajectory of the bullet hole is slightly downwards suggesting that who ever fired the shot was slightly elevated, from the back of a lorry, that sort of height. The angle does not suggest a shot from a tree or roof top."*

2.12 Human Rights Watch also sought the expert opinion of a firearms and ballistics specialist, Dr Graham Renshew, who examined the photographs of the bullet hole in Kaunda's car, the photographs of a bullet cartridge found near the scene of the incident the day after the rally, and a photograph of a bullet that UNIP claimed was extracted from the vehicle after the incident. He explained the following, according to the Human Rights Watch:

> *"One bullet clearly penetrated the vehicle through the back ... The bullet is consistent with the cartridge ... The bullet, with its folds bent backwards, suggests it had pierced three layers of metal, consistent with penetrating the vehicle. It could be a non-Russian AK 47 but is more likely to be a G-3 or Belgian FAR ...*
>
> *The bullet hole in Kaunda's vehicle is consistent with the bullet and cartridge. With this information it might be possible to match the bullet with the firearm that fired it. While one cannot say this was an assassination attempt, one can say for sure that all the passengers in the car are lucky to be alive. If the bullet had hit a window it would have been able to kill somebody straight. It was slowed down and displaced by going through metal."*

2.13 Secondly, in its report, submitted by the author, on the investigation of the Kabwe-shooting, the Inter-African Network for Human Rights and Development concluded that the shooting incident took place, and that an international tribunal should investigate the assassination attempt on the former President Kenneth Kaunda. This report, which is based on evidence taken from persons directly concerned in the incident, shows that the car in which the author was travelling, had left the centre of Kabwe. Before it did so, there is evidence that the local police commander had given orders to his men to fire on the car without giving any details as to the objective of such shooting; this information was relayed on the police radio network. At a roundabout at the outskirts of Kabwe, a police vehicle whose registration number and driver have been identified attempted to block the path of the car. The car's driver evaded this attempt, and there is evidence that two policemen standing on the back of the police vehicle opened fire on the car.

2.14 The author claims that on 28 November 1997, while on board a British Airways plane in Harare, he was told by airport and airline personnel that there was a VIP plane on the runway sent by the Zambian Government to collect him. He decided not to go back to Zambia, and has since this incident been residing in Australia. He will not return to Zambia, as he fears for his life.

2.15 From the information supplied by the author, he does not appear to have taken steps to exhaust domestic remedies, except for filing a claim for compensation to the Attorney-General of the Republic of Zambia, Ministry of Legal Affairs. The claim was filed approximately one and a half month after the Kabwe shooting, that is on 15 October 1997. The author states that he has no access to effective domestic remedies.

The complaint

3. The author alleges that the incident on 23 August 1997 was an assassination attempt by the Zambian Government, and that it constitutes a violation of article 6 of the Covenant. The author further claims that the Zambian judges are not free from pressure in the performance of their duties, and that this implies a violation of article 14. He also raises the issue of security of person. He submits that an amount of US$ 2.5 million in damages would be reasonable compensation.

The Committee's admissibility consideration

4.1 The communication with its accompanying documents was transmitted to the State party on 3 July 1998. The State party has not responded to the Committee's request, under rule 91 of the rules of procedures, to submit information and observations in respect of the admissibility and the merits of the communication, despite several reminders addressed to it, the latest on 5 August 1999. The Committee recalls that it is implicit in the Optional Protocol that the State party makes available to the Committee all information at its disposal and regrets the lack of cooperation by the State party in the present case. In the absence of any reply from the State party, due weight must be given to the author's allegations to the extent that they have been substantiated.

4.2 Before considering the claims contained in the communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.3 With respect to exhaustion of domestic remedies, the Committee notes that the author has argued that he has no access to domestic tribunals and that no effective domestic remedies are available to him. The State party has failed to contest before the Committee these allegations and thus due weight must thus be given to the author's claim. The Committee considers therefore that it is not precluded by article 5, paragraph 2 (b) of the Optional Protocol from examining the communication.

4.4 With respect to the author's claim of a violation of article 14 of the Covenant, the Committee notes that the information provided by the author does not substantiate for purposes of admissibility, the author's claim that he is a victim of a violation of article 14 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.5 The Committee considers that the author's remaining claims should be examined on the merits. Accordingly, the Committee finds the communication admissible and proceeds without delay to consider the merits of the author's claims under articles 6 (1) and 9 (1).

The Committee's consideration of the merits

5.1 The Human Rights Committee has examined the present case on the basis of the material placed before it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

5.2 The Committee observes that article 6, paragraph 1, entails an obligation of a State party to protect the right to life of all persons within its territory and subject to its jurisdiction. In the present case, the author has claimed, and the State party has failed to contest before the Committee that the State party authorized the use of lethal force without lawful reasons, which could have led to the killing of the author. In the circumstances, the Committee finds that the State party has not acted in accordance with its obligation to protect the author's right to life under article 6, paragraph 1, of the Covenant.

5.3 The Committee recalls its jurisprudence that article 9 (1) of the Covenant protects the right to security of person also outside the context of formal deprivation of liberty.[1] The interpretation of article 9 does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the present case, it appears that persons acting in an official capacity within the Zambian police forces shot at the author, wounded him, and barely missed killing him. The State party has refused to carry out independent investigations, and the investigations initiated by the Zambian police have still not been concluded and made public, more than three years after the incident. No criminal proceedings have been initiated and the author's claim for compensation appears to have been rejected. In the circumstances, the Committee concludes that the author's right to security of person, under article 9, paragraph 1 of the Covenant, has been violated.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 6, paragraph 1, and 9, paragraph 1, of the Covenant.

7. Under article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide Mr Chongwe with an effective remedy and to take adequate measures to protect his personal security and life from threats of any kind. The Committee urges the State party to carry out independent investigations of the shooting incident, and to expedite criminal proceedings against the persons responsible for the shooting. If the outcome of the criminal proceedings reveals that persons acting in an official capacity were responsible for the shooting and hurting of the author, the remedy should include damages to Mr Chongwe. The State party is under an obligation to ensure that similar violations do not occur in the future.

8. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] See the Committee's Views in case No. 195/1985, Delgado Paez, para. 5.5, adopted on 12 July 1990, document CCPR/C/39/D/195/1985, and in case No. 711/1996 Carlos Dias, para. 8.3, adopted on 20 March 2000, document CCPR/C/68/D/711/1996.

L. Communication No. 833/1998, Karker v. France (Views adopted on 26 October 2000, seventieth session)*

Submitted by:	Mrs. Samira Karker, on behalf of her husband, Mr. Salah Karker (represented by Mr. Jean-Daniel Dechezelles)
Alleged victim:	Mr. Salah Karker
State party:	France
Date of communication:	27 March 1998 (initial submission)
Documentation references:	Special Rapporteur's rule 86/91decision, transmitted to the State party on 18 September 1998 (not issued in document form)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 October 2000,

Having concluded its consideration of communication No. 833/1998 submitted to the Human Rights Committee by Mrs. Samira Karker under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mrs. Samira Karker. She presents the communication on behalf of her husband, Salah Karker, a Tunisian citizen born on 22 October 1948, residing in France since 1987. She claims that her husband is a victim of violations by France of his Covenant rights. After the initial communication, the author was represented by Jean-Daniel Dechezelles, barrister in Paris.

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* The following members of the Committee participated in the examination of the case: Mr. Nisuke Ando, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The facts

2.1 In 1987, Mr. Karker, who is co-founder of the political movement Ennahdha, fled Tunisia, where he had been sentenced to death by trial in absentia. In 1988, the French authorities recognized him as a political refugee. On 11 October 1993, under suspicion that he actively supported a terrorist movement, the Minister of the Interior ordered him expelled from French territory as a matter of urgency. The expulsion order was not, however, enforced, and instead Mr. Karker was ordered to compulsory residence in the department of Finistère. On 6 November 1993, Mr. Karker appealed the orders to the Administrative Tribunal of Paris. The Tribunal rejected his appeals on 16 December 1994, considering that the orders were lawful. The Tribunal considered that from the information before it, it appeared that the Ministry of the Interior was in possession of information showing that Mr. Karker maintained close links with Islamic organizations which use violent methods, and that in the light of the situation in France the Minister could have concluded legally that Mr. Karker's expulsion was imperative for reasons of public security. It also considered that the resulting interference with Mr. Karker's family life was justifiable for reasons of ordre public. The Tribunal considered that the compulsory residence order, issued by the Minister in order to allow Mr. Karker to find a third country willing to receive him, was lawful, in accordance with article 28 of the decree of 2 November 1945,[1] in view of the fact that Mr. Karker was a recognized political refugee and could not be returned to Tunisia. On 29 December 1997, the Council of State rejected Mr. Karker's further appeal.

2.2 Following the orders, Mr. Karker was placed in a hotel in the department of Finistère, then he was transferred to Brest. Allegedly because of media pressure, he was then transferred to St. Julien in the Loire area, and from there to Cayres, and subsequently to the South East of France. Lastly, in October 1995, he was assigned to Digne-les-Bains (Alpes de Haute Provence), where he has resided since. According to the order fixing the conditions of his residence in Digne-les-Bains, Mr. Karker is required to report to the police once a day. The author emphasizes that her husband has not been brought before the courts in connection with the suspicions against him.

2.3 The author states that she lives in Paris with her six children, a thousand kilometres away from her husband. She states that it is difficult to maintain personal contact with her husband. On 3 April 1998, Mr. Karker was sentenced to a suspended sentence of six months' imprisonment for having breached the compulsory residence order by staying with his family during three weeks.

The complaint

3. The author does not invoke any article of the Covenant, but it would appear that the facts may raise issues under articles 12 and 17, and possibly 9 and 13 of the Covenant.

State party's observations

4.1 By submission of 23 November 1998, the State party addresses both the admissibility and the merits of the communication.

4.2 As to the admissibility, the State party argues that the author of the communication has not justified that she is qualified to represent her husband. The State party refers to rule 90 (b) of the Committee's rules of procedure that a communication should be submitted by the victim personally or by his representative, and that a communication on behalf of a victim can be accepted when it appears that the individual in question is unable to submit the communication personally. In the present case, the author has advanced no circumstances to justify why her husband is not in a position to present personally a communication to the Committee, nor has she shown that she has received a mandate to represent him. The State party therefore requests the Committee to reject the communication as inadmissible.

4.3 Secondly, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies, as far as the alleged violations of articles 9, 12 and 17 of the Covenant are concerned. In this context, the State party notes that whereas the expulsion order and the first compulsory residence order were appealed by Mr. Karker, the further compulsory residence orders, in particular the order of October 1995 to assign him to residence in Digne-les-Bains has not been subject of appeal. The State party adds that an appeal to the Administrative Tribunal is an available and effective remedy, which allows the judge to verify whether the compulsory residence order does not interfere more than necessary with the rights of the person, in particular with his right to family life.

4.4 Subsidiarily the State party addresses the merits of the communication and argues that no violation of the Covenant has occurred. First, the State party argues that article 9 of the Covenant is not applicable in Mr. Karker's case, because he is not subject to any arrest or detention. In this respect, the State party explains that under its domestic law a clear difference is made by the courts between measures to retain a person in a closed space, such as measures of detention, and measures to assign a person to residence, which give freedom of movement within determined boundaries. In Mr. Karker's case, first he was free to move within the department of Finistère, and at the moment, having been assigned to Digne-les-Bains, he is free to move within that community. According to the State party, Mr. Karker is thus not subject to any restriction of his liberty within the meaning of article 9 of the Covenant.

4.5 The State party acknowledges that the compulsory residence order limits Mr. Karker's freedom of movement within the meaning of article 12 of the Covenant. However, the State party argues that these restrictions are permissible under paragraph 3 of article 12, since they are provided by law (article 28 of the decree of 2 November 1945 as amended) and necessary for protection of public order, as was confirmed by the courts. The State party refers to the decision by the Administrative Tribunal of Paris that the Minister of the Interior could have concluded lawfully that Mr. Karker's expulsion was imperative for reasons of public security. Since the expulsion order could not be carried out because of Mr. Karker's refugee status, a certain measure of monitoring his activities had to be imposed. The State party concludes that the measures restricting Mr. Karker's freedom of movement have thus been imposed in his own interest, in order to safeguard his rights as political refugee.

4.6 The State party submits that its decision to expel Mr. Karker was in compliance with the requirements of article 13 of the Covenant. In this context, it notes that the order of 11 October 1993 was taken in accordance with the law (article 26 of the decree of 2 November 1945 as amended). The law provides that in case of necessity for reasons of

State security or public security, an expulsion order can be pronounced without obtaining the recommendation of a commission of three magistrates. The State party invokes article 13, and argues that compelling reasons of national security would have allowed it not to provide Mr. Karker with any possibility of review. However, in fact, Mr. Karker did have access to the administrative tribunal and subsequently to the Council of State to contest the expulsion order taken against him. The courts confirmed that the order was lawful. According to the State party, the requirements of article 13 have thus been fully met.

4.7 With respect to article 17 of the Covenant, the State party argues that the compulsory residence order does not prevent Mr. Karker's family members from being with him. The members of his family are not subject to any restriction, and are free to join Mr. Karker in Digne-les-Bains. The separation of Mr. Karker from his family is due to the fact that his family have chosen their residence in Eaubonne, a suburb of Paris, instead of in Digne-les-Bains. The State party moreover states that Mr. Karker benefits from regular administrative authorizations to visit his family in the Parisian region. Further, the State party argues that in general the separation of family members within the context of compulsory residence orders does not violate article 17 of the Covenant. As to the alleged insecurity concerning Mr. Karker's situation, the State party submits that as long as he benefits from refugee status, the expulsion order against him cannot be executed.

Counsel's comments on the State party's submission

5.1 In his comments on the State party's submission, counsel contests the State party's argument that the communication should be declared inadmissible. As to the standing of the author to present the communication, counsel argues that there is no doubt that Mr. Karker is not in a position to present his communication personally. He further argues that the Committee's rules of procedure do not require an explicit mandate of representation as is the case in certain procedures of domestic law. Counsel explains that, in view of the insecurity of his place of residence, Mr. Karker has preferred to leave the documents pertaining to his case with his wife. Further, he is far away from his legal counsel which creates difficulties in communication. For these reasons, Mr. Karker consented to have his wife represent him before the Committee. In any event, counsel joins a letter from Mr. Karker giving his express approval of his representation by his wife.

5.2 With regard to the State party's argument that not all available domestic remedies have been exhausted, counsel submits that the legality of the compulsory residence order to Digne-les-Bains has been contested by Mr. Karker during the criminal proceedings against him before the first instance court in Pontoise, in April 1998. During these proceedings, where Mr. Karker was being charged for breach of the compulsory residence order, he based his defence on the unlawful nature of the order. Moreover, in May 1996, Mr. Karker applied to the first instance court in Digne-les-Bains to challenge the modalities of the compulsory residence order, since he was subject to additional around the clock surveillance by the police. His application was rejected by the court, and the Court of Appeal in Aix-en-Provence dismissed his appeal. Counsel further argues that since the compulsory residence order is dependent on the expulsion order, and since no more remedies exist to challenge the expulsion order, it would be useless to continue appealing each separate compulsory residence order. In this context, counsel recalls that under article 5 (2) (b) of the Optional Protocol only those remedies that provide a chance of success need to be exhausted. The appeal against the legality of the first compulsory residence order having been rejected, it is clear that no effective recourse was available against the following orders which were based on the same expulsion order.

5.3 On the merits, counsel contests the State party's argument that Mr. Karker has not been deprived of his liberty within the meaning of article 9 of the Covenant. Counsel argues that, like detention, compulsory residence equally limits freedom of movement. He recalls that the first order limited Mr. Karker's freedom of movement to 15.6 square kilometres, and in his opinion this constitutes a closed space seriously restricting the liberty of the person. In Digne-les-Bains Mr. Karker's liberty is restricted to 117.07 square kilometres, that is 0.02 per cent of French territory. Moreover, counsel points out that Mr. Karker is being followed by the police, which in itself constitutes an attack on his liberty.

5.4 With regard to article 12 of the Covenant, counsel acknowledges that the restriction of Mr. Karker's freedom of movement is provided by law, but challenges the State party's assertion that it is necessary for reasons of public order. He notes that the State party bases itself on the judgement by the Administrative Tribunal of Paris, concerning the lawfulness of the expulsion order of October 1993, as well as the first compulsory residence order of the same date, and argues that this conclusion by the tribunal at the time cannot be used to show justification for the *present* restriction of the author's freedom of movement. According to counsel, the State party has failed to show that at this moment the restriction is necessary for protection of public order. He emphasizes that a compulsory residence order imposed because of the impossibility to execute an expulsion order, is by its nature only an emergency measure and cannot be prolonged indefinitely. In this context, counsel observes that in 1994, the court in Paris convicted a newspaper, Minute, for having called Mr. Karker an active terrorist, since the newspaper could not substantiate its accusations that he was involved in attacks in Monastir and in an attempt to assassinate the prime minister of Tunisia. According to counsel, this shows that accusations of terrorism against Mr. Karker have been rejected by the courts. Nevertheless, the State party bases itself on these accusations to justify the restrictions on Mr. Karker's freedom of movement. In counsel's opinion, if the State party does not show evidence of links between Mr. Karker and terrorist organizations, the expulsion order and consequently the compulsory residence order are unlawful. Counsel further points out that paragraph 3 of article 12 lays down a further condition for restrictions of freedom of movement, namely that they be consistent with the other rights recognized in the Covenant. In this context, he argues that to assign a person to a residence hundreds of kilometres removed from his family, in rural areas, limiting his freedom of movement continuously since 1993, evidently constitutes violations of numerous rights recognized in the Covenant, such as the right to freedom of movement (arts. 9 and 12), the right to dignity of the human person (art. 10), the right to review (art. 13) and the right to family life (arts. 17 and 23).

5.5 Concerning article 13 of the Covenant, counsel notes that said provision only allows the elimination of review of an expulsion where compelling reasons of national security exist. He argues that the State party has not shown that these reasons existed, since in substantiation it only refers to the decisions of the Administrative Tribunal of Paris and the Council of State, which are being challenged by Mr. Karker. Counsel reiterates that the State party should show the

Committee that Mr. Karker's expulsion is necessary for protection of public order at present. He further argues that, whatever urgency may have existed in 1993, is not likely still to exist at present. He recalls in this context that Mr. Karker has never been convicted by the French courts for acts of terrorism.

5.6 With regard to article 17 of the Covenant, counsel contests the State party's argument that the separation of Mr. Karker from his family is caused by his family's choice to reside in Eaubonne. Counsel notes that Mr. Karker and his family resided in Eaubonne at the time of the issuance of the expulsion, and consequently compulsory residence, order against him. Counsel recalls that Mr. Karker was assigned to five different localities within the first two years following the expulsion order. Because the authorities can issue a new compulsory residence order at any time, changing the place of residence, and consequently Mr. Karker never knows how long he is going to stay at a particular place, it is unreasonable to require his family to change residence and interrupt the social life and schooling of the children, every time when the authorities change the conditions of Mr. Karker's order. According to counsel, Mr. Karker has obtained permission only twice to join his family in Paris. Counsel concludes that there is no justification for the interference with Mr. Karker's family life.

5.7 As to Mr. Karker's sense of insecurity, counsel notes that Mr. Karker's refugee status is not permanent. But more seriously, in counsel's opinion, is the insecurity caused by the compulsory residence order, which can be changed without advance notice. According to counsel, the resulting insecure situation constitutes arbitrary interference with his family life. Counsel recalls that Mr. Karker has petitioned the Minister of the Interior on numerous occasions, most recently in April 1998, without ever having received a reply.

5.8 Counsel joins a letter from Mr. Karker, in which he challenges the expulsion order and consequent compulsory residence order against him, and states that they were issued for political reasons. He complains that the charges against him have never been specified, and that he has never been brought before a court to have these charges determined. According to him, Ennahdha, the movement of which he is a leader, has never practised or supported terrorism, and is one of the most moderate Islamic movements in the world. He argues therefore that the orders against him are arbitrary. Concerning the conditions of the compulsory residence order, Mr. Karker states that he was followed by police officers around the clock, from 30 October 1993 to 25 May 1996. This surveillance was renewed on 8 October 1997, some weeks before a visit of the President of Tunisia to France and again terminated after the return of the President to Tunisia. According to Mr. Karker, this shows that the decisions taken by the French administration in this regard are purely political.

5.9 Mr. Karker further contests the impartiality of the decisions taken by the courts concerning the lawfulness of the expulsion order and consequent compulsory residence order against him. He states that the French Government provided the courts with police documents, which were made up for the occasion, copied from the Tunisian police and not credible, but which the courts considered trustworthy. According to Mr. Karker, the courts' judgements are unjust and taken under political pressure. If the State party had evidence against him, it should have charged him accordingly and brought him before a judge.

5.10 Mr. Karker confirms that his wife acted with his consent when presenting his case to the Committee. He argues that it is clear that the compulsory residence order violates his right to family life, since he is forced to live in a hotel room, and he does not have the means to rent a lodging for his family. He also states that the State authorities refuse to pay the costs of his family's visits during the holidays. He further states that he does not want to impose on his family the same insecure life he is forced to lead by taking them with him to each new place of residence. He states that in the summer of 1995, while he was residing in St. Julien Chapteuil, his family rented a holiday bungalow for a week, close to the hotel where he was staying. However, he was not allowed to spend the nights with his family, but had to be in his hotel from 10 o'clock at night until 8 o'clock in the morning. He further states that at the time, he was followed everywhere by plain clothes armed policemen.

5.11 Mr. Karker complains that he is for all practical purposes kept in detention, since he cannot freely travel, work, lead a family life. Moreover, he complains that the length of his detention is unlimited, and that it has been imposed upon him without him ever having been convicted by the French courts.

Further submissions

6.1 Upon request from the Committee's Working Group, meeting prior to the Committee's sixty-ninth session in July 2000, that the State party provides information with regard to the Minister's answer to Mr. Karker's request for modification of the expulsion order and the compulsory residence order of 28 April 1998, the State party notes that the Minister did not reply to the request. According to its administrative law, a silence of four months after a request to a competent authority is to be interpreted as a denial of the request. Such implicit denial can be appealed to the administrative tribunals.

6.2 With regard to the Working Group's question which measures the State party has taken to review regularly the situation of Mr. Karker and the necessity of the continuation of the order against him, the State party recalls that anyone subject to an expulsion order or a compulsory residence order can at any time request the administrative authorities for a modification of such order. On the occasion of such requests from Mr. Karker, the authorities may re-examine his situation and review the necessity of the continuation of the measures against him.

6.3 As to the reasons for the continued compulsory residence order against Mr. Karker, the State party explains that the order was issued because of the impossibility to implement the expulsion order against him. According to the State party the compulsory residence is necessary for reasons of public order to prevent that Mr. Karker would engage in dangerous activities. For the State party, it is not possible to lift the order because of the persistence of the risks created by the movements of which Mr. Karker is considered to be an active supporter. The State party recalls that Mr. Karker may at any time apply to have the order against him lifted, and in case of refusal of his application, he may appeal to the administrative tribunals, which he has failed to do so far. The State party also submits that if necessary Mr. Karker is given permission to leave temporarily his place of residence. The State party also states that Mr. Karker is free to leave France for any other country of his choice where he will be admitted.

7. In his comments, counsel states that the State party's submission contains no new information. He forwards to the Committee copies of requests made on Mr. Karker's behalf by third parties and the negative replies of the Minster of the Interior thereto. He also adds a copy of refusals, dated 24 March 1999 and 22 February 2000, by the Prefect of the Alpes de Haute Provence to grant Mr. Karker permission to go to Eaubonne. He also adds newspaper articles showing public support for Mr. Karker's cause.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has noted the State party's objections to admissibility ratione personae. The Committee considers that there is no reason to doubt the standing of the author, who is the alleged victim's wife and who has acted with his full consent, as has since been confirmed by him.

8.3 With respect to the domestic remedies, the Committee notes that Mr. Karker has exhausted all available remedies with respect to the expulsion order against him. Since the subsequent compulsory residence orders are all based on the expulsion order and on the impossibility to carry out the expulsion, and seeing that Mr. Karker's appeal against the first compulsory residence order was rejected by the courts, the Committee considers that Mr. Karker is not required to challenge each new compulsory residence order before the courts, in order to comply with the requirement of article 5 (2) (b) of the Optional Protocol.

8.4 In respect of the claim that Mr. Karker's right to privacy and family under article 17 of the Covenant has been violated, the Committee notes that this claim is based on the conditions of the compulsory residence order against him. The Committee notes that Mr. Karker has requested modification of these conditions on several occasions, and that, not having received any reply to his requests, according to French law after four months his requests were considered to be denied. The State party has explained and the author has not contested that Mr. Karker could have appealed the denial to the competent administrative tribunal, which however he has failed to do. The author's claim under article 17 of the Covenant is therefore inadmissible under article 5 (2) (b) of the Optional Protocol.

8.5 The Committee considers that the claim under article 9 of the Covenant is inadmissible ratione materiae, since the measures to which Mr. Karker is being subjected do not amount to deprivation of liberty such as contemplated by article 9 of the Covenant.

8.6 The Committee finds the communication admissible as far as it may raise issues under articles 12 and 13 of the Covenant and proceeds without delay to a consideration of its merits.

9.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2. The Committee notes that Mr. Karker's expulsion was ordered in October 1993, but that his expulsion could not be enforced, following which his residence in France was subjected to restrictions of his freedom of movement. The State party has argued that the restrictions to which the author is subjected are necessary for reasons of national security. In this respect, the State party produced evidence to the domestic courts that Mr. Karker was an active supporter of a movement which advocates violent action. It should also be noted that the restrictions of movement on Mr. Karker allowed him to reside in a comparatively wide area. Moreover, the restrictions on Mr. Karker's freedom of movement were examined by the domestic courts which, after reviewing all the evidence, held them to be necessary for reasons of national security. Mr. Karker has only challenged the courts' original decision on this question and chose not to challenge the necessity of subsequent restriction orders before the domestic courts. In these circumstances, the Committee is of the view that the materials before it do not allow it to conclude that the State party has misapplied the restrictions in article 12, paragraph 3.

9.3 The Committee observes that article 13 of the Covenant provides procedural guarantees in case of expulsion. The Committee notes that Mr. Karker's expulsion was decided by the Minister of the Interior for urgent reasons of public security, and that Mr. Karker was therefore not allowed to submit reasons against his expulsion before the order was issued. He did, however, have the opportunity to have his case reviewed by the Administrative Tribunal and the Council of State, and at both procedures he was represented by counsel. The Committee concludes that the facts before it do not show that article 13 has been violated in the present case.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] Article 28 reads: "*L'étranger qui fait objet d'un arrêté d'expulsion ou qui doit être reconduit à la frontière et qui justifie être dans l'impossibilité de quitter le territoire français en établissant qu'il ne peut ni regagner son pays d'origine ni se rendre dans aucun autre pays peut, ..., être astreint par arrêté du ministre de l'intérieur à résider dans les lieux qui lui sont fixés, dans lesquels il doit se présenter périodiquement aux services de police et de gendarmerie.*"

M. Communications Nos. 839/1998, 840/1998 and 841/1998, Mansaraj et al. v. Sierra Leone, Gborie et al. v. Sierra Leone and Sesay et al. v. Sierra Leone (Views adopted on 16 July 2001, seventy-second session)*

Submitted by:	Mr. Anthony B. Mansaraj et al. Mr. Gborie Tamba et al. Mr. Abdul Karim Sesay et al.
Alleged victim:	The authors
State party:	Sierra Leone
Date of communication:	12 and 13 October 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 2001,

Having concluded its consideration of communications No. 839/1998, 840/1998 and 841/1998, submitted to the Human Rights Committee by Mr. Anthony B. Mansaraj et al., Mr. Gborie Tamba et al. and Mr. Abdul Karim Sesay et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communications are Messrs. Anthony Mansaraj, Gilbert Samuth Kandu-Bo and Khemalai Idrissa Keita (communication No. 839/1998), Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, Alpha Saba Kamara, John Amadu Sonica Conteh, Abu Bakarr Kamara (communication No. 840/1998), Abdul Karim Sesay, Kula Samba, Nelson Williams, Beresford R. Harleston, Bashiru Conteh, Victor L. King, Jim Kelly Jalloh and Arnold H. Bangura (communication No. 841/1998). The authors are represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

1.2 On 16 July 2001, the Committee decided to join the consideration of these communications.

The facts as submitted by the authors

2.1 The authors of the communications (submitted 12 and 13 October 1998), at the time of submission, were awaiting execution at one of the prisons in Freetown. The following 12 of the 18 authors were executed by firing squad on 19 October 1998: Gilbert Samuth Kandu-Bo; Khemalai Idrissa Keita; Tamba Gborie; Alfred Abu Sankoh (alias Zagalo); Hassan Karim Conteh; Daniel Kobina Anderson; John Amadu Sonica Conteh; Abu Bakarr Kamara; Abdul Karim Sesay; Kula Samba; Victor L. King; and Jim Kelly Jalloh.

2.2 The authors are all members or former members of the armed forces of the Republic of Sierra Leone. The authors were charged with, inter alia, treason and failure to suppress a mutiny, were convicted before a court martial in Freetown, and were sentenced to death on 12 October 1998.[1] There was no right of appeal.

2.3 On 13 and 14 October 1998, the Committee's Special Rapporteur for New Communications requested the Government of Sierra Leone, under rule 86 of the Rules of Procedure, to stay the execution of all the authors while the communications were under consideration by the Committee.

2.4 On 4 November 1998, the Committee examined the State party's refusal to respect the rule 86 request by executing 12 of the authors. The Committee deplored the State party's failure to comply with the Committee's request and decided to continue the consideration of the communications in question under the Optional Protocol.[2]

The complaint

3.1 Counsel submits that as there is no right of appeal from a conviction by a court martial the State party has violated article 14, paragraph 5, of the Covenant.

3.2 Counsel states that a right of appeal did originally exist under Part IV of the Royal Sierra Leone Military Forces Ordinance 1961, but was revoked in 1971.

The State party's submission

4. The State party has not provided any information in relation to these communications notwithstanding the Committee's repeated invitation to do so.

Issues and proceedings before the Committee

5.1 By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant

(Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its Views to the State party and to the individual (art. 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

5.2 Quite apart from any violation of the rights under the Covenant charged against a State party in a communication, the State party would be committing a serious breach of its obligations under the Optional Protocol if it engages in any acts which have the effect of preventing or frustrating consideration by the Committee of a communication alleging any violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In respect of the present communication, counsel submits that the authors were denied their right under article 14, paragraph 5 of the Covenant. Having been notified of the communication, the State party breached its obligations under the Protocol, by proceeding to execute the following alleged victims, Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Victor L. King, and Jim Kelly Jalloh, before the Committee could conclude its examination of the communication, and the formulation of its Views. It was particularly inexcusable for the State to do so after the Committee had acted under its Rule 86 requesting the State party to refrain from doing so.

5.3 Interim measures pursuant to Rule 86 of the Committee's Rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Optional Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.

5.4 The Human Rights Committee has considered the present communications in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. The Committee notes with concern that the State party has not provided any information clarifying the matters raised by these communications. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the authors' allegations, to the extent that they have been substantiated.

5.5 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the State party has not claimed that there are any domestic remedies yet to be exhausted by the authors and has not raised any other objection to the admissibility of the claim. On the information before it, the Committee is of the view that the communication is admissible and proceeds immediately to a consideration of the merits.

5.6 The Committee notes the authors' contention that the State party has breached article 14, paragraph 5, of the Covenant in not providing for a right of appeal from a conviction by a court martial a fortiori in a capital case. The Committee notes that the State party has neither refuted nor confirmed the authors' allegation but observes that 12 of the authors were executed only several days after their conviction. The Committee considers, therefore, that the State party has violated article 14, paragraph 5, of the Covenant, and consequently also article 6, which protects the right to life, with respect to all 18 authors of the communication. The Committee's prior jurisprudence is clear that under article 6, paragraph 2, of the Covenant the death penalty can be imposed inter alia only, when all guarantees of a fair trial including the right to appeal have been observed.

6.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Sierra Leone of articles 6 and 14, paragraph 5 of the Covenant.

6.2 The Committee reiterates its conclusion that the State committed a grave breach of its obligations under the Optional Protocol by putting 12 of the authors to death before the Committee had concluded its consideration of the communication.[3]

6.3 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide, Anthony Mansaraj, Alpha Saba Kamara, Nelson Williams, Beresford R. Harleston, Bashiru Conteh and Arnold H. Bangura, with an effective remedy. These authors were sentenced on the basis of a trial that failed to provide the basic guarantees of a fair trial. The Committee considers, therefore, that they should be released unless Sierra Leonian law provides for the possibility of fresh trials that do offer all the guarantees required by article 14 of the Covenant. The Committee also considers that the next of kin of Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Victor L. King, and Jim Kelly Jalloh should be afforded an appropriate remedy which should entail compensation.

6.4 Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] This is the only information provided by counsel on the convictions.

[2] Vol. 1, A/54/40, chap. 6, para. 420, annex X.

[3] Piandiong, Morallos and Bulan v. The Philippines (869/1999).

N. Communication No. 846/1999, Jansen-Gielen v. The Netherlands (Views adopted on 3 April 2001, seventy-first session)*

Submitted by:	Mrs. Gertruda Hubertina Jansen-Gielen (represented by Mr. B.W.M. Zegers)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	7 August 1998 (initial submission)
Date of decision on admissibility and adoption of Views:	3 April 2001

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 2001,

Having concluded its consideration of communication No. 846/1999 submitted to the Human Rights Committee by Mrs. Gertruda Hubertina Jansen-Gielen, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 7 August 1997, is Gertruda Maria Hubertina Jansen-Gielen, a Dutch citizen, born on 21 November 1940. She claims to be a victim of a violation by the Netherlands of articles 14, 17 and 19 of the Covenant on Civil and Political Rights. She is represented by Mr. B.W.M. Zegers, legal counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

The facts as submitted

2.1 The author used to work as a teacher at the Roman Catholic primary school Budschop in Nederweert. She was employed by a private association.

2.2 On 20 December 1989, the Director of the General Civil Pension Scheme (Algemeen Burgerlijk Pensioenfonds), which is a private scheme, declared the author 80 per cent disabled. This decision was based on a psychiatrist's report established in November 1989.

2.3 The author appealed this decision, but her appeal was dismissed by the District Court of the Hague on 24 September 1992. From the Court's decision, it appears that the author was frequently absent from work for reasons of health, from October 1987 to October 1988, and as of October 1988, did not report to work at all. The psychiatric report showed that her absence was caused by a serious work conflict, with which she could not cope.

2.4 The author then appealed to the Central Appeals Tribunal (Centrale Raad van Beroep), the highest instance in pension cases. In September 1994, she changed counsel. By letter of 26 September 1994, received by the Tribunal on 27 September 1994, the new counsel addressed to the Tribunal a psychological report, refuting the conclusions of the first expert report. The hearing at the Central Appeals Tribunal took place as scheduled on 29 September 1994. In its judgement of 20 October 1994, the Central Appeals Tribunal dismissed the author's appeal. It considered that it could not take into account the expert report submitted by the author because of its late presentation. It appears from the judgement that the Tribunal considered that the defending party would be unreasonably hindered in its defence if the document were to be allowed. In reaching its decision the Tribunal also referred to the provisions of article 8:58 of the (new) General Administrative Law.

2.5 According to the author, the General Administrative Law came into force on 1 January 1994, but, pursuant to article 1 (3) of the law, does not apply to the author's case, since she appealed before 1 January 1998.[1] According to the old administrative procedure, no deadline for the submission of a report existed, and the report should thus have been considered as having been presented in time.

2.6 The author moreover points out that, in the summons for the hearing of 29 September 1994, the Tribunal did not advise her that she could submit new documents only up to 10 days before the date of the hearing. Further, it is argued that in practice even under the new law, late submission of documents is accepted as long as it does not seriously affect the other party's rights.

The complaint

3.1 The author argues that the Tribunal's failure to take the expert report into account violates her right to provide evidence, since it prevented her from refuting the other party's arguments as to her ability to work. She claims that this constitutes a violation of article 14, since she did not receive a fair hearing.

3.2 She also claims a violation of article 17 of the Covenant, as the wrongful decision that she is more than 80 per cent disabled and cannot be appointed in any job, affects her private life (physical and moral integrity) as well as her reputation.

3.3 She further claims that the underlying reason to have her declared disabled was the fact that her traditional Roman Catholic attitude was not appreciated by the school management, in violation of article 18 of the Covenant.

The State party's submissions

4.1 By submission of 22 March 1999, the State party challenges the admissibility of the communication because the author has failed to refer in the domestic proceedings, even implicitly, to the Covenant rights she now claims violated. The State party argues that the communication should be declared inadmissible for non-exhaustion of domestic remedies.

4.2 Further, the State party argues that the author has failed to substantiate her complaint that the reason behind her being declared incapable of work was related to her traditional catholic beliefs, and that this part of her communication should be declared inadmissible under article 2 of the Optional Protocol.

5.1 By further submission of 1 September 1999, the State party explains that, in the course of the author's appeal against the Pension Fund's decision to declare her more than 80 per cent disabled, a hearing was scheduled before the Central Appeals Tribunal (*Centrale Raad van Beroep*) on 29 September 1994. On 26 September 1994, the author's present counsel notified the Tribunal that he was replacing the author's former counsel and he enclosed a further psychological report to challenge the psychiatric report upon which the Fund based its decision. The Tribunal, however, did not append the psychological report to the case file as it was submitted late.

5.2 With regard to the author's claim that the Tribunal's decision not to append the psychological report to the case file deprived her of a fair hearing, the State party recalls the Committee's jurisprudence that it is generally for the Courts of States parties and not for the Committee to review the facts and evidence presented to and evaluated by the domestic courts. The State party contests that the fact that the report was not taken into account made the proceedings manifestly arbitrary or constituted a denial of justice. In this context, the State party explains that the introduction of the General Administrative Law on 1 January 1994 led to an amendment to procedural law. The old law did not mention a time frame and the new Act now provides that parties may submit documents up to 10 days before a hearing. In accordance with transitional law, the old law was applicable in the hearing of the author's case.

5.3 According to the State party, the registrar's office at the Central Appeals Tribunal received the letter and enclosure from the author's counsel only two days before the hearing. Counsel did not explain why the document was submitted so late. In the absence of a specific rule, the Tribunal judged the admissibility of the document in question in the light of the principles of procedural due process, one of which requires that proceedings be conducted in such a way that neither party is unreasonably obstructed in conducting its case. The Tribunal concluded that appending documents to the case file at that stage of the proceedings would constitute an unreasonable obstruction.

5.4 The State party submits that it is a general principle of the Dutch law of administrative procedure, and one that must have been known to counsel, that no document may be admitted in proceedings if the other party has had no opportunity to take note of it within a reasonable time. Counsel could have requested an adjournment to give the other party and the Tribunal time to study the document. He chose not to do so and thus intentionally took the risk that the report, being submitted late, would not be appended to the file.

5.5 The State party denies that the Tribunal's decision was based on the new Act. According to the State party, the Court made reference to the new Act only to illustrate the general rule of due process that parties should have time to prepare themselves properly for a hearing. The author's rights have thus not been violated in this respect.

5.6 With respect to the author's claim under article 17, the State party states that the review of the author's ability to work was lawful under the Superannuation Act, since the author had been absent due to illness. In respect to the author's claim that her absence was due to a labour conflict and not to illness, the State party refers to the psychiatric report on which the Fund based its decision. This report concludes that the author was unable to cope with the conflict that had arisen at work. According to the State party, the Fund's decision was thus not unlawful.

5.7 On the question of whether the alleged interference was arbitrary, the State party refers to the judgement of the Central Appeals Tribunal, which acknowledges that special care should be given to avoid abusing invalidity pensions in circumstances like the author's. The Tribunal concluded that the Fund's decision had been careful. On this basis, the State party denies that the interference was arbitrary.

5.8 Similarly, the State party denies that the declaration of invalidity constituted an unlawful attack on her reputation. In this context, the State party recalls that the decision was lawful and that it was not based on incorrect facts. According to the State party, a person's reputation can be impaired only by an attack accessible to the public.[2] It states that the declaration of unfitness for work was only sent to the parties directly concerned.

5.9 In respect to the author's claim under article 18, the State party refers to its observations on admissibility and argues that this claim lacks any substantiation, and that no violation occurred.

Author's comments on the State party's submission

6.1 Counsel reiterates that the Tribunal's failure to append the report to the case file made the proceedings manifestly arbitrary and constituted a denial of justice. He notes that since the old administrative law was applicable. [illegible] documents were legally submitted in time. The fact that the Tribunal only received the documents two days before the hearing cannot be considered an unreasonable obstruction in conducting the case. According to counsel, there was enough time to read the report carefully. Further, the Tribunal has the competence to adjourn the hearing and could have done so if it considered that more time was needed to study the document. Moreover, counsel argues that the fact that the Tribunal quoted the new Act can only be seen as a pretext for not appending the report.

6.2 Counsel maintains that the author's absence from work was due to a labour dispute, not to illness. The report upon which the Fund's decision was based was refuted by the report which the Tribunal did not allow. The Superannuation Act was abused in order to settle a labour dispute and the interference was thus unlawful. Moreover, the new psychological report, which was not appended to the case file, shows that the declaration that the author was unfit for work was based on incorrect facts. The declaration thus interfered with the author's privacy and undermined her physical and moral integrity as well as her reputation. In this context, counsel argues that the declaration is accessible to the public, because the hearings in the Central Appeals Tribunal are public.

6.3 Counsel further argues that the State party allows a practice where healthy people who hold politically incorrect opinions, as in the author's case a traditional Roman Catholic opinion, are expelled from participating in the social-employment process. According to counsel, the new psychological report showed that the author was able to cope with the labour dispute and was not unfit for work. According to counsel, therefore, the only reason why she was declared unfit for work was the fact that her traditional Roman Catholic attitude was not appreciated by the Roman Catholic management and they wanted to get rid of her. Counsel alleges that the Dutch authorities systematically try to suppress the expression of the traditional Roman Catholic teaching, for example by starting criminal investigations against Roman Catholic laymen or priests when they publicly put forward the traditional Roman Catholic teaching. Counsel maintains that the labour law was abused in the author's case to suppress the expression of her Roman Catholic beliefs in violation of article 18 of the Covenant.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 With regard to the author's claims that she is a victim of a violation of articles 17 and 18 of the Covenant because she was allegedly wrongfully declared unfit for work, the Committee notes that the author has not provided sufficient elements to substantiate her claims, for purposes of admissibility. The Committee notes that the author's statements and allegations in this respect have been very general and that she has not brought these issues to the attention of the domestic tribunals. This part of the author's communication is therefore inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol.

7.3 With regard to the author's claim under article 14, the Committee notes that all available domestic remedies have been exhausted and that there are no other objections to the admissibility of the claim. Accordingly, the Committee declares the communication admissible insofar as it may raise an issue under article 14 of the Covenant. It proceeds without delay to the consideration of the merits of this claim.

8.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The author has claimed that the failure of the Central Appeals Tribunal to append the psychological report, submitted by her counsel, to the case file two days before the hearing, constitutes a violation of her right to a fair hearing. The Committee has noted the State party's argument that the Court found that admission of the report two days before the hearing would have unreasonably obstructed the other party in the conduct of the case. However, the Committee notes that the procedural law applicable to the hearing of the case did not provide for a time limit for the submission of documents. Consequently, it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit to ensure that each party could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings. In the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing, the Committee finds a violation of article 14, paragraph 1 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by The Netherlands of article 14, paragraph 1 of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an effective remedy.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Central Appeals Tribunal, at the beginning of its judgement of 20 October 1994, indicates that the appeal has been considered on the basis of the legal provisions in force before the entry into force of the General Administrative Law.

[2] The State party cites Nowak, CCPR commentary, page 306, paragraph 42.

APPENDIX

Separate, concurring, opinion of David Kretzmer and Martin Scheinin

While we agree with the Committee's conclusion, as set out in paragraph 8.2 of its Views, that there was a violation of article 14, paragraph 1, in the present case, we differ in the reasons for this decision.

It is generally for the domestic courts to decide on admissibility of documents in court proceedings and the procedure for their submission. While at the time of the author's case before the domestic courts there was no provision in the law setting time limits for the submission of documents, the State party has argued that under the domestic law of administrative procedure no documents could be submitted in proceedings unless the other party would be afforded an opportunity to take note of them within reasonable time. This has not been contested by the author. However, the State party has offered no explanation why, given the centrality of the report to the author's case, the court did not take measures to allow consideration of the report by the other party rather than simply ignoring it. In these particular circumstances, we agree that the author's right to a fair determination of her rights in a suit of law, protected under article 14, paragraph 1, of the Covenant, was violated.

(Signed) David Kretzmer

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

O. Communication No. 855/1999, Schmitz-de-Jong v. The Netherlands (Views adopted on 16 July 2001, seventy-second session)*

Submitted by:	Ms. M. Schmitz-de-Jong (represented by counsel, Mr. Paul S.P. Vanderheyden)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	25 November 1998 (initial submission)

The Human Rights Committee, established under article 28 of the international Covenant on Civil and Political Rights,

Meeting on 16 July 2001,

Having concluded its consideration of communication No. 855/1999 submitted to the Human Rights Committee by Ms. M. Schmitz-de-Jong under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Ms. M. Schmitz-de-Jong, a Dutch citizen, born on 15 February 1949, and residing in Gulpen, the Netherlands. She claims to be a victim of a violation of article 26, in conjunction with articles 3 and 5, of the International Covenant on Civil and Political Rights. She is represented by counsel.

The facts as submitted

2.1 Every Dutch citizen aged 65 years and older has the right to a pensioners' pass (so-called PAS-65). Partners of pass-holders have a subsidiary right to the pass, on the condition that they be 60 years or older. Pass owners pay reduced fees for public transport, social and cultural activities, library services and museum entries.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.2 The author is married to Wilhelm Theodor Schmitz, born on 4 May 1924. Mr. Schmitz is in possession of a PAS-65. On 26 February 1993, the author applied for a partner pass. The municipality of Gulpen refused the pass on 16 March 1993, because the author did not fulfil the age requirement. The author applied for a review of the decision, which was rejected on 25 May 1993. The Council of State rejected her appeal on 15 August 1996. With this, all domestic remedies are said to have been exhausted.

The complaint

3. According to the author, the failure to give her a partner pass constitutes discrimination based on age. She refers to the Government's information brochure which explains that the pass is meant to promote the active participation of old age pensioners in society, and that in order to enhance this, the pass is also given to partners of old age pensioners. Since the average age difference between old age pensioners and their partners is between 4 and 5 years, it has been decided that all partners of 60 years or older are also entitled to the pass. The author argues that this age limit is arbitrary, and that the purpose of the partner pass does not justify its limitation to partners of 60 years and older.

The State party's observations

4.1 The State party, by submissions of 16 August 1999 and 29 February 2000, informs the Committee that as of 1 September 1999, the partner pass is abolished, following the finding by the Equal Treatment Commission that the scheme for partners indirectly discriminated between people according to marital status. The State party argues that, accordingly, the basis for the author's application has been removed.

4.2 As regards the author's complaint that she is a victim of discrimination on the grounds of age, the State party explains that the lower age limit for eligibility was expressly set at 60. Lowering this age limit was held to conflict with the aims of the senior citizen's pass, to which the aims of the partner's pass are related. According to the State party persons under the age of 60 are too far away from the target group for which the senior citizen's pass was created. The State party recalls that the author was 44 years of age when she applied for a partner's pass. The State party further invokes financial reasons for limiting the partner's pass to partners of 60 years and older.

Counsel's comments

5. In his comments, counsel points out that the author has been a victim of discrimination for the past seven years, and that the abolition of the partner pass as of 1 September 1999 does not affect this. Moreover, counsel points out that abolishing the partner scheme has no consequences for the present owners of the partner's pass since they can keep it and continue using it. According to counsel, if the author had been granted her pass when she requested it, she would now be allowed to continue using it. Counsel maintains that in view of the purpose of the partner's pass - social and cultural stimulation of the senior citizen to whom the partner is married - no age limit is permissible.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the author has exhausted all available domestic remedies and that the State party has not raised any objections to the admissibility of the claim. The Committee has also verified that the same matter is not being examined by another procedure of international investigation or settlement. Accordingly, the Committee declares the communication admissible and proceeds to the consideration of the merits.

7.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The author has claimed that she is a victim of discrimination on the ground of age, because as a 44-year-old (in 1993) she was not entitled to a senior citizen's partner's pass, which was only provided to partners of 60 years and older. The Committee recalls that a distinction does not constitute discrimination if it is based on objective and reasonable criteria. In the present case, the Committee finds that the age limitation of allowing only partners who have reached the age of 60 years to obtain an entitlement to various rate reductions as a partner to a pensioner above the age of 65 years is an objective criterion of differentiation and that the application of this differentiation in the case of the author was not unreasonable.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it do not reveal a breach of any article of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

P. Communication No. 857/1999, Blazek et al. v. The Czech Republic (Views adopted on 12 July 2001, seventy-second session)*

Submitted by:	Messrs. Miroslav Blazek, George A. Hartman and George Krizek
Alleged victim:	The authors
State party:	The Czech Republic
Date of communication:	16 October 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 12 July 2001,

Having concluded its consideration of communication No. 857/1999 submitted to the Human Rights Committee by Messrs. Miroslav Blazek, George A. Hartman and George Krizek under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communications (dated 16 October 1997, 13 November 1997, and 29 November 1997 and subsequent correspondence) are Miroslav Blazek, George Hartman and George Krizek, natives of Czechoslovakia who emigrated to the United States after the Communist takeover in 1948, and who subsequently became naturalized United States citizens. They claim to be victims by the Czech Republic of violations of their Covenant rights, in particular of article 26. They are not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of an individual opinion by Committee member Nisuke Ando is appended to the present document.

The facts as submitted

2.1 The authors are naturalized United States citizens, who were born in Czechoslovakia and lost Czechoslovak citizenship by virtue of the 1928 Naturalization Treaty between the United States and Czechoslovakia, which precludes dual citizenship. They left Czechoslovakia after the Communist takeover in 1948. Their properties in Czechoslovakia were subsequently confiscated pursuant to confiscation regulations of 1948, 1955 and 1959.

2.2 Mr. Miroslav Blazek states that he is precluded from claiming his inheritance, including real property in Prague and agricultural property in Plana-nod-Luznici because he is not a Czech citizen. He submits copy of a letter from his lawyer in the Czech Republic, advising him that he could not file a claim in the present circumstances, since he does not fulfil the conditions of Czech citizenship required by the applicable law. However, his uncle, a French and Czech citizen, submitted a claim on his own behalf and on behalf of the author concerning jointly-owned property in Prague; the Government, however, severed the case and denied the author his share.

2.3 George A. Hartman, an architect by profession, was born in 1925 in the then Czechoslovak Republic and emigrated to the United States on 26 December 1948. He obtained political asylum in the United States and became a naturalized United States citizen on 2 April 1958, thus becoming ineligible for dual citizenship according to the 1928 Naturalization Treaty between the United States and Czechoslovakia. Until December 1948 he and his brother Jan (who subsequently became a French citizen while retaining Czech citizenship) had owned four apartment buildings in Prague and a country home in Zelizy.

2.4 By judgement of 1 July 1955 the Criminal Court in Klatovy found Mr. Hartman to have illegally left Czechoslovakia. He was sentenced in absentia and his property in Czechoslovakia was formally confiscated as a punishment for the illegal act of leaving the Czechoslovak Republic in 1948. Pursuant to law 119/1990, adopted after the demise of the Communist government, the author's criminal conviction for illegally leaving the country was invalidated.

2.5 By application of 17 October 1995 Mr. Hartman sought the restitution of his property, but his application was rejected because he did not fulfil the requirement of Czech citizenship. In order to qualify under the restitution law, Mr. Hartman continued to seek to obtain Czech citizenship for many years. Since 9 November 1999 he has dual Czech and United States citizenship. Notwithstanding his current Czech citizenship, he has not been able to obtain restitution because the statute of limitations for filing claims for restitution expired in 1992.

2.6 George Krizek states that his parents' property, including a wholesale business (bicycles) in Prague, a grain and dairy farm in a Prague suburb, and agricultural land in Sestajovice, was confiscated in 1948 without any compensation. After the death of his parents, he fled Czechoslovakia and emigrated to the United States, becoming a naturalized citizen in 1974. In April 1991 he claimed ownership of his property pursuant to Law No. 403/1990, but his claims were rejected by the Ministry of Agriculture. In 1992 the author again presented his claims under laws 228 and 229/1991. However, he was informed that in order to be eligible for restitution, he would have to apply for Czech citizenship and take up permanent residence in the Czech Republic. Notwithstanding, he again filed a claim through his lawyer in Prague in 1994, without success.

2.7 By virtue of a 1994 judgement of the Czech Supreme Court, the requirement of permanent residence for restitution claims was removed, however the requirement of Czech citizenship remains in force.

The complaint

3.1 The authors claim to be victims of violations of their Covenant rights by the Czech Republic in connection with the confiscation of their properties by the Communist authorities and the discriminatory failure of the democratic Governments of Czechoslovakia and of the Czech Republic to make restitution. They contend that the combined effect of Czech laws 119/1990 (of 23 April 1990) on Judicial Rehabilitation, 403/1990 (of 2 October 1990) on restitution of property, 87/1991 (of 21 February 1991, subsequently amended) on Extra-Judicial Rehabilitation, 229/1991 (of 21 May 1991) on Agricultural Land and 182/1993 (of 16 June 1993) on the creation of the Constitutional Court together with the position taken by the Czech Government on Czech citizenship discriminates against Czech émigrés who lost Czech citizenship and are now precluded from recovering their property.

3.2 The authors refer to the Committee's decision concerning communication No. 516/1992 (Simunek v. The Czech Republic) in which the Committee held that the denial of restitution or compensation to the authors of that communication because they were no longer Czech citizens constituted a violation of article 26 of the Covenant, bearing in mind that the State party itself had been responsible for the departure of its citizens, and that it would be incompatible with the Covenant to require them again to obtain Czech citizenship and permanently to return to the country as a prerequisite for the restitution of their property or for the payment of appropriate compensation.

3.3 The authors contend that, in order to frustrate the restitution claims of Czech émigrés to the United States, the Czech authorities used to invoke the 1928 United States Treaty with Czechoslovakia which required that anyone applying for the return of Czech citizenship first renounce United States citizenship. Although the Treaty was abrogated in 1997, the subsequent acquisition of Czech citizenship does not, in the view of Czech authorities, entitle the authors to reapply for restitution, because the date for submission of claims has expired.

3.4 Reference is made to the case of two other American citizens who applied to the Czech courts for a ruling aimed at the deletion of the citizenship requirement from law 87/1991. The Czech Supreme Court, however, confirmed in its Judgement US 33/96 that the citizenship requirement was constitutional.

3.5 The authors further complain that the State party is deliberately denying them a remedy and that there has been a pattern of delay and inaction aimed at defeating their claims, in contravention of article 2 of the Covenant.

3.6 One of the authors, George A. Hartman, illustrates the alleged discrimination by referring to the case of his brother Jan Hartman, who is a Czech and French citizen, and who was able to obtain restitution for his half of the property in Prague confiscated in 1948 pursuant to judgement of 25 June 1991, whereas the author was denied compensation because at the time of filing his claim he was not a Czech citizen.

Exhaustion of domestic remedies

4.1 The authors claim that in their cases domestic remedies are non-existent, because they do not qualify under the restitution law. Moreover, the constitutionality of this law has already been tested by other claimants and affirmed by the Czech Constitutional Court. They refer, in particular, to the finding of the Constitutional Court in case US 33/96 (Jan Dlouhy v. Czech Republic, decision of 4 June 1997), confirming the constitutionality of the citizenship requirement in order to be an "eligible person" under the Rehabilitation Law No. 87/1991.

4.2 They complain that since 1989 they have devoted considerable amount of time and money in futile attempts to obtain restitution, both by engaging formal judicial procedures and by addressing petitions to government ministries and officials, including judges at the Constitutional Court, invoking inter alia the Czech Charter on Basic Rights and Freedoms.

Consideration of admissibility and examination of the merits

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not and has not been submitted to any other instance of international investigation or settlement.

5.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol that authors exhaust domestic remedies, the Committee notes that the State party has not contested the authors' argument that in their cases there are no available and effective domestic remedies, and in particular, that because of the preconditions of law 87/1991, they cannot claim restitution. In this context, the Committee notes that other claimants have unsuccessfully challenged the constitutionality of the law in question; that earlier views of the Committee in the cases of Simunek and Adam remain unimplemented; and that even following those complaints, the Constitutional Court has upheld the constitutionality of the Restitution Law. In the circumstances, the Committee finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude the Committee's consideration of the communications of Messrs. Blazek, Hartman and Krizek.

5.4 With regard to the author's claim that they have suffered unequal treatment by the State party in connection with the scheme of restitution and compensation put into effect after the Optional Protocol entered into force for the State party the Committee declares the communication admissible, insofar as it may raise issues under articles 2 and 26 of the Covenant.

5.5 Accordingly, the Committee proceeds to an examination of the merits of the case, in the light of the information before it, as required by article 5, paragraph 1, of the Optional Protocol. It notes that it has received sufficient information from the authors, but no submission whatever from the State party. In this connection, the Committee recalls that a State party has an obligation under article 4, paragraph 2, of the Optional Protocol to cooperate with the Committee and to submit written explanations or statements clarifying the matter and the remedy, if any, that may have been granted.

5.6 In the absence of any submission from the State party, the Committee must give due weight to the submissions made by the authors. The Committee has also reviewed its earlier Views in cases No. 516/1993, Mrs. Alina Simunek et al. and No. 586/1994, Mr. Joseph Adam. In determining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant factors, including the original entitlement of the authors to the properties in question. In the instant cases the authors have been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens. The question before the Committee is therefore whether the precondition of citizenship is compatible with article 26. In this context, the Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.

5.7 Whereas the criterion of citizenship is objective, the Committee must determine whether in the circumstances of these cases the application of the criterion to the authors would be reasonable.

5.8 The Committee recalls its Views in Alina Simunek v. The Czech Republic and Joseph Adam v. The Czech Republic, where it held that article 26 had been violated: "the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for [their] … departure, it would be incompatible with the Covenant to require [them] … to obtain Czech citizenship as a prerequisite for the restitution of their property, or, alternatively, for the payment of compensation" (CCPR/C/57/D/586/1994, para. 12.6). The Committee finds that the precedent established in the Adam case applies to the authors of this communication. The Committee would add that it cannot conceive that the distinction on grounds of citizenship can be considered reasonable in the light of the fact that the loss of Czech citizenship was a function of their presence in a State in which they were able to obtain refuge.

5.9 Further, with regard to time limits, whereas a statute of limitations may be objective and even reasonable in abstracto, the Committee cannot accept such a deadline for submitting restitution claims in the case of the authors, since under the explicit terms of the law they were excluded from the restitution scheme from the outset.

The Committee's Views

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation or article 26, in relation to Messrs. Blazek, Hartman, and Krizek.

7. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including an opportunity to file a new claim for restitution or compensation. The Committee further encourages the State party to review its relevant legislation and administrative practices to ensure that neither the law nor its application entails discrimination in contravention of article 26 of the Covenant.

8. The Committee recalls, as it did in connection with its prior Views concerning the cases of Alina Simunek and Joseph Adam, that the Czech Republic, by becoming a State party to the Optional Protocol, recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established.

9. In this connection, the Committee wishes to receive from the State party, within 90 days following the transmittal of these Views to the State party, information about the measures taken to give effect to the Views. The State party is also requested to translate into the Czech language and to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion of Committee member Nisuke Ando

Reference is made to my individual opinion appended to the Human Rights Committee's Views on case No. 586/1994: Adam v. The Czech Republic.

(Signed) Nisuke Ando

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Q. Communication No. 858/1999, Buckle v. New Zealand (Views adopted on 25 October 2000, seventieth session)*

Submitted by: Mrs. Margaret Buckle

Alleged victim: The author

State party: New Zealand

Date of communication: 21 September 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2000,

Having concluded its consideration of communication No. 858/1999 submitted to the Human Rights committee by Mrs. Margaret Buckle, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Margaret Buckle, a British/New Zealand citizen. She claims that she is a victim of violations by New Zealand of articles 17, 18, 23 and 24 of the International Covenant on Civil and Political Rights. The author is not represented by counsel.

The facts as presented by the author

2.1 The author's six children (aged at the time between 8 and 1 year of age) were removed from her care in 1994 allegedly because of her inability to look after them adequately.

2.2 In August 1997 the author appealed, to the Court of Appeal, the decision of the New Zealand Family Court that had deprived her of her guardianship rights. On 25 February 1998, the Court of Appeal confirmed the decision of the Family Court. The author's request for leave to appeal to the Privy Council against the decision of February 1998 was rejected. Notwithstanding this Mrs Buckle travelled to the United Kingdom and secured a hearing in May 1998, before the Judicial Committee of the Privy Council. The application was unsuccessful.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The complaint

3.1 The author claims that the removal of her guardianship rights over her six children is in violation of articles 17 and 23 of the Covenant, as this allegedly constitutes arbitrary interference in the exercise of her rights as a mother. The author considers that regardless of the conditions under which the children lived with her, it is her right as a mother to have her children with her and that there is no possible cause to remove the children from her care.

3.2 She claims that the authorities have interfered in her life and have taken the children away because she is a newborn Christian and consequently the decision to remove the children constitutes a violation of article 18.

3.3 The author further claims a violation of article 24 of the Covenant in respect of her six children since their removal from her side deprives them of their right to be in the care of their natural mother.

The State party's submission on admissibility and merits

4.1 In its observations both on admissibility and merits, dated 29 October 1999, the State party notes that domestic remedies have been exhausted in respect to this case.

4.2 However it argues that the communication is inadmissible, since the author's allegations have not been substantiated in respect of the claims under articles 17, 18, 23 and 24 of the Covenant. Furthermore with respect to article 24, the State party argues that the author does not represent her children, nor has she explained how their rights may have been breached.

4.3 The State party submits that the author's allegations are vague and imprecise. In respect of articles 17, 18 and 23 it submits that the author fails to identify with sufficient particularity the alleged violations of those articles. The generality of the author's language does not provide sufficient detail to support the claims. No supporting evidence is provided, the complaint is simply based on the assertions of the author. According to the State party the documents provided indicate that the process whereby the children were removed was carried out according to law with full judicial scrutiny. Each of the claims of violation of Covenant rights thus fails for want of sufficient substantiation.

4.4 With respect to the allegations under article 24 the State party submits that the complaint is inadmissible on the grounds that article 24 confers rights upon subjects other than the author herself, and that the author is not - in intent or effect - making a communication on behalf of those subjects. The author's communication is told from her own perspective and relates claims of violations of her rights. Nor can it be said that the communication is made on behalf of the children. While Rule 90 (l) (b) permits communications to be made without express authorization on behalf of an alleged victim when it appears that he is unable to submit the communication himself, that procedure envisages a communication on behalf, in respect of and from the perspective of the children. Here the author concentrates solely on her own rights, rather than making a complaint on behalf of the children's claiming a violation of their rights as envisaged under Rule 90 (l) (b). Furthermore, the author has failed to substantiate as required by the Rule why it is impossible for her children to complain themselves.

5.1 On the merits, the State party contends that while the communication contains a number of references to religion, the author fails to outline how her religious rights have been violated, either generally or by the specific events partially described. The mere fact that a person has religious beliefs cannot mean, without more, that a violation of another right also constitutes a violation of the right to religious freedom. The State party accordingly submits that the author has failed to demonstrate how article 18 is relevant, and how it might have been violated.

5.2 The State party holds that article 23 is an institutional guarantee for the "family" unit as such. While protections against arbitrary and unlawful interference with the family are contained in article 17, article 23 has a different purpose as it requires States to recognize the family group unit as a basic social component, and to accord it the corresponding legal recognition. New Zealand law accords the family unit extensive recognition, and there is a comprehensive set of statutes governing the rights and obligations of families and their members in a range of circumstances, from education, to financial benefits, to child support and the consequences of separation and divorce. The author has failed to demonstrate in any manner how New Zealand law falls short of this general institutional obligation.

5.3 With respect to the alleged violation of article 17 the State party concedes that the removal of children from parental custody could constitute interference; however it submits that in the present case the actions were neither unlawful nor arbitrary, and that the purpose of the intervention was legitimate within the meaning of the Covenant in particular having regard to article 24. In this respect, the State party submits in that in the author's case the removal of the children was undertaken strictly in accordance with law. First, efforts were made to assist the family that did not involve Court processes. Social workers held informal meetings with the family to address concerns for the children in line with the philosophy of minimum intervention and with the goal of empowering the family. It was agreed to strengthen the broader family support network, expand on health care and social work contacts with the children and provide for more regular feedback. When these steps proved insufficient in the light of the author's increasing inability to care for her children, a Family Group Conference was convened. The FGC, which included eight family members, agreed to recommend to the Court that a declaration be made and the majority of the children placed with family members. Unfortunately the author's capacity to care for her children did not improve, and the decision that the children be placed with caregivers has been confirmed by regular statutory reviews and the appeal brought by the author against Court decisions.[1]

5.4 The State party argues that the intervention was not arbitrary but rather that it was carried out with due consideration to whether the specific act of enforcement "had a purpose that seems legitimate on the basis of the Covenant in its entirety, and whether it was predictable in the sense of the rule of law and, in particular, whether it was reasonable (proportional) in relation to the purpose to be achieved".[2]

5.5 The State party notes that, in accordance with the Children, Young Persons and their Families Act of 1989, in general, intervention cannot occur without notice or on a surprise basis. A Family Group Conference discussing the options available occurs before any resort to a Court declaration can be made, as occurred in the present case. The threshold for intervention which provides the jurisdiction for a Court declaration is outlined in section 14 of the Act and includes:

> "A child or young person is in need of care or protection ... if - (a) The child or young person is being, or is likely to be, harmed (whether physically or emotionally or sexually), ill-treated, abused, or seriously deprived; or (b) The child's or young person's development or physical or mental or emotional well-being is being, or is likely to be, impaired or neglected, and that impairment or neglect is, or is likely to be, serious and avoidable; or
>
> (f) The parents or guardians or other persons having the care of the child or young person are unwilling or unable to care for the child or young person;"

5.6 The State party puts forward that while these terms as they stand are broad, it is not possible to be more specific or precise, given the varied nature of the situations they are designed to deal with. Under the New Zealand legislation, there is an extensive range of procedural protections available from before the making of a declaration and on the variety of appeal and review mechanisms which follow. These include the right to appear in Court in relation to the care and protection application, regular reviews conducted of the care arrangements and the right to apply for review of orders granted. Further, the CYPF Act ensures that the interference with family life is proportional to the means to be achieved. Judicial intervention only occurs as ultima ratio, if the Court is satisfied that it is not practicable or appropriate to provide care or protection for the child or young person by any other means. When considering whether orders are to be made, the Court is guided by principles that the family unit is to be empowered to make appropriate decisions and that the removal of a child or young person from a parent is a last resort. The welfare and interests of the child or young person shall be the first and paramount consideration.

5.7 The State party maintains that when the Court first made its declaration in October 1992 that the children were in need of care and protection, the Court was giving effect to the outcomes previously agreed by the family and social workers at the family group conference. The oldest two daughters were placed with their maternal grandparents and one daughter with her maternal aunt and uncle. The others were placed with caregivers living close by to the mother. The author retained her guardianship rights which were to be exercised in conjunction with the additional guardians' rights conferred upon the caregivers. This changed in December 1997, when following the High Court judgement of 18 August 1997, the children were placed under the sole guardianship of the Director-General of Social Welfare which in effect suspended the author's guardianship rights. Despite the suspension of guardianship, the author was still granted ongoing access rights to the children conditional upon her undertaking counselling. That she has declined to do. Regular reviews of the children's situation that have been carried out pursuant to the statute. The author's appeal against the High Court judgement was rejected on 25 February 1998. The State party submits that the author has made full use of the mechanisms existing to review her children's situation outlined above. On each occasion, however, she failed to produce or have produced on her behalf any evidence that would show that there was sufficient change in her capability to care for her children that would warrant their return to her custody. Indeed the weight of evidence was to the contrary, namely that a return of custody to the author was not in the best interests of the children and would be traumatic and detrimental to their well-being. Eighteen witnesses were heard in the main High Court proceedings in August 1997.

5.8 The State party further contends that the author has had every opportunity to assist specialists and the Court to better assess her ability to be custodial parent of her children, but she has refused to cooperate on any occasion. The State party submits that the intervention has been necessary and reasonable and that the safeguard mechanisms in place have confirmed the proportionality of that process.

6. The author informed the Secretariat that she had nothing to add to the State party's submission. She reiterates that her Covenant rights have been violated.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 With respect to the requirement of exhaustion of domestic remedies the State party concedes that with the dismissal of the author's case by the Judicial Committee of the Privy Council all domestic remedies for the purposes of the Optional Protocol have indeed been exhausted.

7.3 With regard to the claim that the author has suffered a violation of article 18 of the Covenant, in respect to her right to freedom of religion since she alleges that the reason she has been deprived of her children is because she is a new born Christian, the Committee considers that the author has failed to substantiate this a claim for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

8. The Committee considers that the author's remaining claims are admissible and proceeds to an examination of the substance of those claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

9.1 Concerning the author's claim under article 17 of the Covenant, the Committee notes the information provided by the State party with respect to the extensive procedures followed in the author's case. The Committee also notes that the situation is under regular review and that the author has been given the opportunity to retain access to her children. In the circumstances, the Committee finds that the interference with the author's family has not been unlawful or arbitrary and is thus not in violation of article 17 of the Covenant.

9.2 The author has also claimed a violation of article 23 of the Covenant. The Committee recognizes the weighty nature of the decision to separate mother and children, but notes that the information before it shows that the State party's authorities and the Courts considered carefully all the material presented to them and acted with the best interests of the children in mind and that nothing indicates that they violated their duty under article 23 to protect the family.

9.3 With respect to the alleged violation of article 24 of the Covenant, the Committee is of the opinion that the author's arguments and the information before it do not raise issues that would be separate from the above findings.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The State party has provided copies of various court decisions in this case (a dossier of some 255 pages of supporting documents).

[2] Reference is made to the Committee's General Comment No. 16 of 8 April 1988 on article 24 where it was held that: "the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant, and should be, in any event, reasonable in the particular circumstances."

R. Communication No. 869/1999, Piandiong et al. v. The Philippines (Views adopted on 19 October 2000, seventieth session)*

Submitted by:	Mr. Alexander Padilla and Mr. Ricardo III Sunga (legal counsel)
Alleged victims:	Mr. Dante Piandiong, Mr. Jesus Morallos and Mr. Archie Bulan (deceased)
State party:	The Philippines
Date of communication:	15 June 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 October 2000,

Having concluded its consideration of communication No. 869/1999 submitted to the Human Rights Committee by Mr. Alexander Padilla and Mr. Ricardo III Sunga under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Alexander Padilla and Ricardo III Sunga. They present the communication as legal counsel to Mr. Dante Piandiong, Mr. Jesus Morallos and Mr. Archie Bulan, whom they claim are victims of violations of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights by the Philippines.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The text of two individual opinions signed by four members is appended.

1.2 On 7 November 1994, Messrs. Piandiong, Morallos and Bulan were convicted of robbery with homicide and sentenced to death by the Regional Trial Court of Caloocan City. The Supreme Court denied the appeal, and confirmed both conviction and sentence by judgement of 19 February 1997. Further motions for reconsideration were denied on 3 March 1998. After the execution had been scheduled for 6 April 1999, the Office of the President, on 5 April 1999, granted a three month reprieve of execution. No clemency was however granted and on 15 June 1999, counsel presented a communication to the Committee under the Optional Protocol.

1.3 On 23 June 1999, the Committee, acting through its Special Rapporteur for New Communications, transmitted the communication to the State party with a request to provide information and observations in respect of both admissibility and merits of the claims, in accordance with rule 91, paragraph 2, of the Committee's rules of procedure. The State party was also requested, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against Messrs. Piandiong, Morallos and Bulan, while their case was under consideration by the Committee.

1.4 On 7 July 1999, the Committee was informed by counsel that a warrant for execution of Messrs. Piandiong, Morallos and Bulan on 8 July 1999 had been issued. After having contacted the State party's representative to the United Nations Office at Geneva, the Committee was informed that the executions would go ahead as scheduled, despite the Committee's request under rule 86, since the State party was of the opinion that Messrs. Piandiong, Morallos and Bulan had received a fair trial.

1.5 Counsel for Messrs. Piandiong, Morallos and Bulan filed a petition with the Supreme Court seeking an injunction, which was refused by the Court on 8 July 1999. Counsel also met personally with the Government's Justice Secretary and asked him not to carry out the death sentence in view of the Committee's request. In the afternoon of 8 July 1999, however, Messrs. Piandiong, Morallos and Bulan were executed by lethal injection.

1.6 By decision of 14 July 1999, the Committee requested from the State party clarifications of the circumstances surrounding the executions. On 21 July 1999, the Special Rapporteur for New Communications and the Committee's Vice-chairperson met with the State party's representative.

The complaint

2.1 Counsel states that Messrs Piandiong and Morallos were arrested on 27 February 1994, on suspicion of having participated, on 21 February 1994, in the robbery of passengers of a jeepney in Caloocan City, during which one of the passengers, a policeman, was killed. After arriving in the police station, Messrs Piandiong and Morallos were hit in the stomach in order to make them confess, but they refused. During a line up, the eyewitnesses failed to recognize them as the robbers. The police then placed them in a room by themselves, and directed the eyewitnesses to point them out. No counsel was present to assist the accused. During the trial, Messrs. Piandiong, Morallos and Bulan testified under oath, but the judge chose to disregard their testimony, because of lack of independent corroboration.

2.2 Counsel further complains that the death sentence was wrongly imposed, because the judge considered that an aggravating circumstance existed, as the crime was committed by more than three armed persons. According to counsel, however, this was not proven beyond reasonable doubt. Moreover, counsel states that the judge should have taken into account the mitigating circumstance of voluntary surrender, since Messrs. Piandiong, Morallos and Bulan came with the police without resisting.

2.3 Counsel further states that the testimonies of the eyewitnesses deserved no credence, because the eyewitnesses were close friends of the deceased and their description of the perpetrators did not coincide with the way Messrs. Piandiong, Morallos and Bulan actually looked. Counsel also states that the judge erred when he did not give credence to the alibi defence.

2.4 Finally, counsel complains that the death penalty was unconstitutional and should not have been imposed for anything but the most heinous crime.

The State party's observations

3.1 By submission of 13 October 1999, the State party explains that domestic remedies were exhausted with the Supreme Court's decision of 3 March 1998, rejecting the supplemental motions for reconsideration. The convicts and their counsel could have filed a communication with the Human Rights Committee at that date. However, they did not do so, but instead petitioned the President for clemency. On 6 April 1999, the President granted a 90 days reprieve, in order to examine the request for pardon. The request was considered by the Presidential Review Committee, composed of the Secretary of Justice, the Executive Secretary and the Chief Presidential Counsel. After careful study of the case, the Committee found no compelling reason to recommend to the President the exercise of presidential prerogative. The State party explains that the President's power to grant pardon cannot reverse nor review the decision by the Supreme Court. The grant of pardon presupposes that the decision of the Supreme Court is valid and the President is merely exercising the virtue of mercy. According to the State party, in submitting themselves to the President's power, the convicts conceded to the decision of the Supreme Court. The State party argues that, having done so, it is highly inappropriate that they would then go back to the Human Rights Committee for redress.

3.2 The State party explains that the President will exercise his constitutional powers to grant pardon if it is proven that poverty pushed the convicts in committing the crime. According to the State party, this cannot be said to have been the case for the crime of which Messrs. Piandiong, Morallos and Bulan were convicted. In this connection, the State party refers to the Supreme Court's judgement which found that the shooting of the police officer in the jeepney, the subsequent robbery of the shot policeman, and finally the second shooting of him while he was pleading to be brought to hospital, revealed brutality and mercilessness, and called for the imposition of the death penalty.

3.3 With regard to the claim of torture, the State party notes that this was not included in the grounds of appeal to the Supreme Court, and thus the Supreme Court did not look into the issue. According to the State party, the Supreme Court takes accusations of torture and ill-treatment very seriously, and would have reversed the lower court's judgement if it were proven.

3.4 Concerning the claim of lack of legal assistance, the State party notes that the accused had legal assistance throughout the trial proceedings and the appeal. With respect to the right to life, the State party notes that the Supreme Court has ruled on the constitutionality of the death penalty as well as the methods of execution and found them to be constitutional.

3.5 In respect to counsel's request to the Committee for interim measures of protection as a matter of urgency, the State party notes that counsel found no need to address the Committee during the year that his clients were on death row after all domestic remedies had been exhausted. Even after the President granted a 90 day reprieve, counsel waited until the end of that period to present a communication to the Committee. The State party argues that in doing so counsel makes a mockery of the Philippine justice system and of the constitutional process.

3.6 The State party assures the Committee of its commitment to the Covenant and states that its action was not intended to frustrate the Committee. In this connection, the State party informs the Committee that to further enhance the review of cases submitted to the President for pardon, a new body called Presidential Conscience Committee to Review Cases of Death Convicts Scheduled for Execution has been created. Chaired by the Executive Secretary, the Conscience Committee has the following members: one representative from the social sciences, one representative from an NGO involved in anti-crime campaign, and two representatives from church-based organizations. The Committee's function is two-fold, namely: to undertake a review of the cases of death convicts, taking into consideration both humanitarian concerns and the demands of social justice and to submit a recommendation to the President on the possible exercise of his power to grant reprieve, commutations and pardons.

Counsel's comments

4.1 Counsel argues that Messrs. Piandiong, Morallos and Bulan considered resort to the President as a domestic remedy necessary for them to exhaust before presenting their communication to the Human Rights Committee. They argue therefore that it was not improper for them to wait until it became clear that clemency was not going to be granted. With respect to the State party's argument that clemency could not be granted because the crime could not be considered as poverty driven, counsel notes that Messrs. Piandiong, Morallos and Bulan disputed the very finding of their supposed authorship of the crime.

4.2 With regard to the State party's argument that the torture was not made a ground of appeal, counsel submits that at trial Messrs. Piandiong, Morallos and Bulan testified under oath that they were ill-treated, and the matter was brought before the Supreme Court in the Supplemental Motion for Reconsideration. In the opinion of counsel, the ill-treatment betrayed the weakness of the prosecution's evidence, because if the evidence would have been strong, no ill-treatment would have been necessary. In reply to the State party's statement that the Supreme Court takes allegations of torture seriously, counsel argues that this is apparently not so, since the Supreme Court failed to take any action in the present case.

4.3 With regard to the State party's statement that the accused benefited from legal representation, counsel notes that this was only so as of the beginning of the trial. Before trial, at the crucial moment of the police line up, no counsel was present.

4.4 With regard to the State party's argument that the Supreme Court has ruled the death penalty and method of execution constitutional, counsel argues that the Supreme Court's judgement deserves to be reconsidered.

4.5 Concerning the request to the Committee for interim measures, counsel reiterates that they waited to present the communication to the Committee, until all domestic remedies, including the petition for clemency, had been exhausted. Counsel further states that it is hard to take the State party's expressed commitment to the Covenant seriously, in the light of the blatant execution of Messrs. Piandiong, Morallos and Bulan, despite the Committee's request not to do so.

The State party's failure to respect the Committee's request for interim measures under its Rule 86

5.1 By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

5.2 Quite apart, then, from any violation of the Covenant charged to a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In respect of the present communication, the authors allege that the alleged victims were denied rights under articles 6 and 14 of the Covenant. Having been notified of the communication, the State party breaches its obligations under the Protocol, if it proceeds to execute the alleged victims before the Committee concludes its consideration and examination, and the formulation and communication of its Views. It is particularly inexcusable for the State to do so after the Committee has acted under its rule 86 to request that the State party refrain from doing so.

5.3 The Committee also expresses great concern about the State party's explanation for its action. The Committee cannot accept the State party's argument that it was inappropriate for counsel to submit a communication to the Human Rights Committee after they had applied for Presidential clemency and this application had been rejected. There is nothing in the Optional Protocol that restricts the right of an alleged victim of a violation of his or her rights under the Covenant from submitting a communication after a request for clemency or pardon has been rejected, and the State party may not unilaterally impose such a condition that limits both the competence of the Committee and the right of alleged victims to submit communications. Furthermore, the State party has not shown that by acceding to the Committee's request for interim measures the course of justice would have been obstructed.

5.4 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has not raised any objections to the admissibility of the communication. The Committee is not aware of any obstacles to the admissibility of the communication and accordingly declares the communication admissible and proceeds without delay with the consideration of the merits.

7.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 Counsel has claimed that the identification of Messrs. Piandiong and Morallos by eyewitnesses during the police line-up was irregular, since the first time around none of the eyewitnesses recognized them, upon which they were put aside in a room and policemen directed the eyewitnesses to point them out. The Court rejected their claim in this respect, as it was uncorroborated by any disinterested and reliable witness. Moreover, the Court considered that the accused were identified in Court by the eyewitnesses and that this identification was sufficient. The Committee recalls its jurisprudence that it is generally for the courts of States parties, and not for the Committee, to evaluate the facts and evidence in a particular case. This rule also applies to questions as to the lawfulness and credibility of an identification. Furthermore, the Court of Appeal, in addressing the argument about the irregularity of the line-up identification, held that the identification of the accused at the trial had been based on in-court identification by the witnesses and that the line-up identification had been irrelevant. In these circumstances, the Committee finds there is no basis for holding that the in-court identification of the accused was incompatible with their rights under article 14 of the Covenant.

7.3 With regard to the other claims, concerning the alleged ill-treatment upon arrest, the evidence against the accused, and the credibility of the eyewitnesses, the Committee notes that all these issues were before the domestic courts, which rejected them. The Committee reiterates that it is for the courts of States parties, and not for the Committee, to evaluate facts and evidence in a particular case, and to interpret the relevant domestic legislation. There is no information before the Committee to show that the decisions by the courts were arbitrary or that they amounted to denial of justice. In the circumstances, the Committee finds that the facts before it do not reveal a violation of the Covenant in this respect.

7.4 The Committee has noted the claim made on behalf of Messrs. Piandiong, Morallos and Bulan before the domestic courts that the imposition of the death sentence was in violation of the Constitution of the Philippines. Whereas it is not for the Committee to examine issues of constitutionality, the substance of the claim appears to raise important questions relating to the imposition of the death penalty to Messrs. Piandiong, Morallos and Bulan, namely whether or not the crime for which they were convicted was a most serious crime as stipulated by article 6 (2), and whether the re-introduction of the death penalty in the Philippines is in compliance with the State party's obligations under article 6 (1) (2) and (6) of the Covenant. In the instant case, however, the Committee is not in a position to address these issues, since neither counsel nor the State party has made submissions in this respect.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that it cannot make a finding of a violation of any of the articles of the International Covenant on Civil and Political Rights. The Committee reiterates its conclusion that the State committed a grave breach of its obligations under the Protocol by putting the alleged victims to death before the Committee had concluded its consideration of the communication.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Ms. Christine Chanet
(partly dissenting)

I dissent from the Committee's view with regard to the single issue of its finding that there has been no violation of article 14 of the Covenant.

In my opinion, in cases involving criminal offences punishable by the death sentence, the presence of a lawyer should be required at all stages of the proceedings, regardless of whether the accused requests it or not or whether the measures carried out in the course of an investigation are admitted as evidence by the trial Court.

Since the State party did not provide the accused with a lawyer during the line-up identification, a violation of articles 14.3 (b) and 14.3 (d), and article 6, of the Covenant should, in my opinion, have been found.

(Signed) Christine Chanet

[Done in English, French and Spanish, the French text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion by Ms. Elizabeth Evatt and Ms. Cecilia Medina Quiroga (partly dissenting)

We do not agree with the conclusions of the Committee concerning the alleged defects in the identification parade. The author made allegations which cast doubt on the fairness of the procedure, particularly since this identification was carried out in the absence of a lawyer. The court referred to these allegations, but rejected them on the basis that it did not need to rely on the identification parade and that any problems relating to it had been overcome by the identification of the author by witnesses at the trial. However, the identification of accused in court by witnesses who had taken part in the allegedly faulty identification parade does not in itself overcome any defects which affected the earlier identification of the accused by those witnesses. The court gave no other reasons for rejecting the allegations, and thus the doubts raised by the author remain unanswered and must be given weight. In these circumstances, there remain serious questions about the fairness of the trial which in our view amount to a violation of article 14 (1).

(Signed) Elizabeth Evatt

(Signed) Cecilia Medina Quiroga

[Done in English, French and Spanish, the French text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion by Mr. Martin Scheinin (partly dissenting)

I fully concur in the main finding of the Committee in the present case: that the State party has breached its obligations under the Optional Protocol by executing the three persons on whose behalf the communication was submitted, while their case was pending before the Committee, disregarding a duly communicated Rule 86 request. Also, I concur in that the issues related to the reintroduction of the death penalty after once abolished, and whether the crimes in question constituted "most serious crimes" in the meaning of article 6, paragraph 2, were not sufficiently substantiated to enable the Committee to find a violation of article 6 on these grounds.

Where I dissent is the issue of denial of the assistance of a lawyer. In my opinion the communication included a sufficiently substantiated claim that the fact that all three accused persons were not assisted by a lawyer prior to the commencement of the actual trial constituted a violation of article 14 and, consequently, of article 6 of the Covenant. Although this claim is separate from the claim related to the issue of identification in relation to two of the accused, the importance of the assistance of a lawyer at earlier stages of the proceedings is manifest in the way the courts treated the identification issue when it was finally raised before them.

As has been emphasized by the Committee in several previous cases, it is axiomatic under the Covenant that persons facing the death penalty are assisted by a lawyer at all stages of the proceedings (see, e.g., Conroy Levy v. Jamaica, Communication No. 179/1996, and Clarence Marshall v. Jamaica, Communication No. 730/1996). The alleged victims were detained for 6 to 8 months prior to their trial. Irrespective of the characterization of the stages of investigation conducted prior to the commencement of the trial as judicial or non-judicial, and irrespective of whether the accused explicitly requested for a lawyer, the State party was under an obligation to secure the assistance of the lawyer to them during this period of time. Failure to do so in a case that resulted in the imposition of capital punishment constitutes a violation of article 14, paragraphs 3 (b) and 3 (d), and, consequently, of article 6.

(Signed) Martin Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

S. Communication No. 884/1999, Ignatane v. Latvia (Views adopted on 25 July 2001, seventy-second session)*

Submitted by:	Ms. Antonina Ignatane represented by counsel, Ms. Tatyana Zhdanok)
Alleged victim:	The author
State party:	Latvia
Date of communication:	17 May 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2001,

Having concluded its consideration of communication No. 884/1999 submitted to the Human Rights Committee by Ms. Antonina Ignatane under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Ms. Antonina Ignatane, a Latvian citizen of Russian origin and a teacher, born in Riga on 21 February 1943. She claims to be the victim of violations of articles 2 and 25 of the International Covenant on Civil and Political Rights by Latvia. The author is represented by counsel.

1.2 The International Covenant on Civil and Political Rights entered into force for Latvia on 14 July 1992, and the Optional Protocol on 22 September 1994.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natawlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahananzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckert Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 At the time of the events in question, Ms. Ignatane was a teacher in Riga. In 1993, she had appeared before a certification board to take a Latvian language test and had subsequently been awarded a language aptitude certificate stating that she had level 3 proficiency (the highest level).

2.2 In 1997, the author stood for local elections to be held on 9 March 1997, as a candidate of the Movement of Social Justice and Equal Rights in Latvia list. On 11 February 1997, she was struck off the list by decision of the Riga Election Commission, on the basis of an opinion issued by the State Language Board (SLB) to the effect that she did not have the required proficiency in the official language.

2.3 On 17 February 1997, the author filed a complaint with the Central District Court concerning the Election Commission's decision, which she considered illegal. The Court transferred the case automatically to the Riga's Circuit Court, which dismissed the case on 25 February, with immediate effect.

2.4 On 4 March 1997, Ms. Ignatane filed a petition against the decision of 25 February with the President of the Civil Division of the Latvian Supreme Court. In a letter dated 8 April 1997, the Supreme Court refused to act on the petition.

2.5 The author had also filed a case with the Public Prosecutor's Office on 4 March 1997. Having considered the petition, the Public Prosecutor's Office stated on 22 April 1997 that there were no grounds to act on the complaint and that the decision in question had been taken with due regard to the law and did not violate the International Covenant on Civil and Political Rights.

2.6 The author has submitted to the Committee a translation of articles 9, 17 and 22 of the Law on Elections to Town Councils and Municipal Councils, of 13 January 1994. Article 9 of the Law lists the categories of people who may not stand for local elections. According to article 9, paragraph 7, no one who does not have level 3 (higher) proficiency in the State language may stand for election. According to article 17, if anyone standing for election is not a graduate of a school in which Latvian is the language of instruction, a copy of his or her language aptitude certificate showing higher level (3) proficiency in the State language must be attached to the "candidate's application". The author's counsel has explained that the copy of the certificate is required to enable SLB to check its authenticity, not its validity.

2.7 According to article 22, only the Election Commission registering a list of candidates is competent to alter the list, and then only:

> (1) By striking a candidate from the list if: ...
>
> (b) The conditions mentioned under article 9 of the present Law are applicable to the candidate, ..., and, in cases covered by paragraph 1 (a), (b) and (c) of the present article, a candidate may be struck off the list on the basis of an opinion from the relevant institution or by court decision.

In the case of a candidate who: ...

(8) Does not meet the requirements corresponding to the higher level (3) of language proficiency in the State language, that fact must be certified by an opinion of the SLB.

2.8 Lastly, Ms. Ignatane recalls that, according to statements made by the SLB at the time of the case hearings, the certification board in the Ministry of Education had received complaints about her proficiency in Latvian. It so happens, the author says, that it was just that Ministry that, in 1996, had been involved in a widely publicized controversy surrounding the closure of No. 9 secondary school in Riga, where she was the head teacher. The school was a Russian-language school and its closure had had a very bad effect on the Russian minority in Latvia.

The complaint

3. The author claims that, by depriving her of the opportunity to stand for the local elections, Latvia violated articles 2 and 25 of the Covenant.

The State party's observations

4.1 In its observations of 28 April 2000, the State party contests the admissibility of the communication. It claims that the author has not exhausted the domestic remedies available to her.

4.2 The State party also submits that the author does not challenge the conclusions of the State Language Board that her proficiency in Latvian is not of the level required in order to stand for elections (level 3), but only the legality of the Election Commission's decision to strike her off the list of candidates. The State party considers that the court rulings are lawful and legitimate and in full accordance with Latvian law and, in particular, with article 9, paragraph 7, and article 22, paragraph 8, of the Law on Elections to Town Councils and Municipal Councils.

4.3 The State party is of the view that the provisions of the aforementioned Law comply with the requirements of the International Covenant on Civil and Political Rights, as provided in the Human Rights Committee's General Comment No. 25 on article 25, which states that "any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria". According to the State party, participation in public affairs requires a high level of proficiency in the State language and such a precondition is reasonable and based on objective criteria, which are set forth in the regulations on the certification of proficiency in the State language. The State party says that, according to those regulations, level 3 proficiency in the State language is required for several categories of persons, including elected representatives. The highest level (level 3) shows an ability to speak the official language fluently, to understand texts chosen at random and to draft texts in the official language, in connection with his or her official duties.

4.4 The State party goes on to say that, as regards the plaintiff's real proficiency in the State language, there is extensive information provided in the court ruling, which states that, if there are complaints about proficiency in the State language, an examination is carried out in order to establish whether the real language proficiency corresponds to the level attested by the certificate. In this particular case, the State party claims that complaints had been received by the Ministry of Education and Science concerning the plaintiff's proficiency in Latvian, although it does not elaborate further or provide any evidence. On 5 February 1997, an examination was carried out which showed that her language proficiency did not meet the requirements of level 3. The Court subsequently referred to the material evidence (a copy of the examination, with the corrections) that the SLB had provided in support of the results of the examination concerning Ms. Ignatane's proficiency in Latvian.

4.5 The examination results served as a basis for barring the plaintiff from the list of candidates for the elections, in accordance with the law. The legality of the act had subsequently been confirmed by the Supreme Court and the Public Prosecutor's Office.

4.6 Regarding the alleged contradiction between the author's certificate and the SLB's conclusions, the State party notes that the SLB's conclusions relate only to the issue of the candidate's eligibility and in no way either imply the automatic invalidation of the certificate or may be used as a basis for revising its appropriateness, unless the holder of the certificate so wishes.

4.7 The State party argues that the author could have taken two further measures. In the first place, Ms. Ignatane could have asked for another language examination, as the SLB indicated during the hearings. The purpose of such an examination would have been to verify the appropriateness of the certificate held by Ms. Ignatane. Secondly, the author could have taken legal action on the basis of the discrepancy between her certificate and the SLB's conclusions with regard to her electoral qualification, which would have led the Court to order another examination in order to verify the appropriateness of the certificate.

4.8 Since none of these possibilities was used by the author, the State party argues that not all domestic remedies have been exhausted. The State party also dismisses the allegation of discrimination against the author on the basis of her political convictions, since all the other members of the same list were accepted as candidates in the elections.

Author's comments on the State party's observations

5.1 In comments dated 22 September 2000, counsel addresses the State party's argument that Ms. Ignatane did not challenge the conclusions of the State Language Board that she did not have the highest level of proficiency in Latvian, but challenged the legality of the Election Commission's decision to strike her off the list of candidates. Counsel acknowledges that Ms. Ignatane certainly challenged the legality of the Electoral Commission's decision, but states that the only ground for that decision was the SLB's conclusion that her proficiency in Latvian did not meet the requirement for the highest level of aptitude. Therefore, according to counsel, the author challenged the legality of the decision by the Election Commission to strike her name from the list of election candidates, which was taken on the basis of the SLB's conclusion.

5.2 Counsel points out that the phrasing used by the State party - "the required third (highest) level to stand for election" - is open to misinterpretation. According to counsel, Latvian electoral law has no requirement for any special level of proficiency in the State language purely in order to stand for election; it is only the regulations on the certification of proficiency in the State language for employment that indicate the three levels required for various positions and professions, and the language aptitude certificate showing level 1, 2 or 3 proficiency in the State language is general in scope.

5.3 With regard to the State party's assertion that the relevant electoral law complies with the requirements of the International Covenant on Civil and Political Rights, as provided in the General Comment on article 25, counsel states that the conditions contained in article 9, paragraph 7, and article 22, paragraph 8, of the Law in question are not based on objective and reasonable criteria, as required by the Human Rights Committee's General Comment on non-discrimination.

5.4 According to article 9, paragraph 7, of the Law, persons whose proficiency in the State language does not meet the requirements of the highest level (level 3) may not be nominated as candidates for local council elections and may not be elected to councils. According to article 22, paragraph 8, a candidate may be struck off the list if his or her language skills do not meet the requirements of proficiency level 3 in the State language, on the basis of an opinion of the State Language Board. According to counsel, in practice, that provision is open to a practically infinite range of interpretations and opens the door to totally discretionary and arbitrary decisions.

5.5 Counsel then addresses the State party's point that an election candidate is given a language examination if complaints have been received. If no complaints have been received, the SLB should submit opinions on every candidate, in the form of an authentication of the copy of each candidate's Latvian language aptitude certificate. Counsel maintains that an unsupported statement that complaints had been made about a candidate and the results of the subsequent examination, which was conducted by a single examiner, a senior inspector at the State Language Inspectorate, cannot be described as objective criteria. The full powers given to a senior inspector are not commensurate with the consequences they give rise to, i.e. the disqualification of an election candidate. Such an approach to the verification of proficiency in the State language makes it possible, if need be, to disqualify all candidates representing a minority.

5.6 Counsel goes on to describe the conditions in which the examination was carried out. Ms. Ignatane was at work, when the German lesson she was giving to a class of schoolchildren was interrupted and she was required to do a written exercise in Latvian. The examination was carried out by an inspector in the presence of two witnesses, who were teachers employed at the same school. Given the circumstances, counsel contends, the spelling mistakes and other errors that were used as evidence of the author's limited proficiency in Latvian should not be taken into account.

5.7 In the third place, with reference to the State party's assertion that participation in public affairs requires a high level of proficiency in the State language and that such a precondition is reasonable and based on objective criteria set forth in the regulations on the certification of proficiency in the State language, counsel contends that such a precondition for standing in local elections is not reasonable. There are no other preconditions for candidates in general, for example with regard to level of education or professional skills. The fact that the only precondition relates to proficiency in Latvian means, according to counsel, that the rights to vote and to be elected are not respected and guaranteed to all individuals with no distinction on the grounds of their language status. Counsel asserts that, for around 40 per cent of the population of Latvia, Latvian is not the mother tongue.

5.8 According to counsel, this precondition of a high level of proficiency in Latvian for participation in local elections is not based on objective criteria. However, that does not mean that the author is of the opinion that the criteria set forth in the regulations on the certification of proficiency in the State language are not objective. Simply, the latter criteria are not applied in the provision (in article 22, paragraph 8, of the Law) that a candidate may be struck off the list if he or she does not meet the requirements of the highest level (level 3) of proficiency in Latvian, and that this must be certified by an opinion of the SLB. Counsel states that, according to the regulations on the certification of proficiency in the State language, language proficiency is certified by a special Certification Commission made up of at least five language specialists. The regulations describe in detail the testing and certification procedure, thereby ensuring its objectivity and reliability. Level 1, 2 and 3 certificates are valid for an unlimited period. According to article 17 of the Law, candidates who have not obtained their secondary school diploma from a school in which Latvian is the language of instruction must submit a copy of their level 3 certificate to the Election Commission. The author had submitted such a copy to the Riga Election Commission. Counsel maintains that the SLB opinion, issued on the basis of an ad hoc examination conducted by a single inspector from the State Language Inspectorate following complaints allegedly received by the Ministry of Education, was not consistent with the requirements of the regulations on the certification of proficiency in the State language. Moreover, the State party acknowledges that the SLB opinion relates only to the issue of eligibility and in no way either implies the automatic invalidation of the certificate or may be used as a basis for revising its appropriateness.

5.9 Fourth and last, counsel takes up the State party's contention that all domestic remedies have not been exhausted. Counsel recalls that the court judgement of 25 February 1997 confirming the Riga Election Commission's decision of 11 February 1997 was final and entered into force with immediate effect. The special procedure available for appealing such decisions is in fact the procedure that the author followed.

5.10 Counsel goes on to point out that remedies should not only be adequate and sufficient, but should also make it possible in practice to obtain the re-establishment of the situation in question. The remedy exhausted by the author - the special procedure for appealing the Election Commission's decision - was the only remedy that would have made it possible to achieve the objective of the complaint, namely, to allow the author to stand in the Riga City Council elections in 1997 by restoring her name to the electoral list.

5.11 Counsel maintains that the State party contradicts itself when it says, on the one hand, that it cannot agree that domestic remedies have been exhausted, since neither of the two possible remedies it mentions for verifying the appropriateness of the author's certificate has been used, and, on the other hand, that, according to the communication, the author challenges the legality of striking her off the list of candidates but not the SLB's opinion that her proficiency in Latvian was not of the required level 3. In any case, each of the procedures mentioned by the State party to verify the appropriateness of the author's certificate takes several months at least and therefore would not have allowed the author to stand in the 1997 elections. In that regard, counsel recalls that the decision to bar the author was taken 26 days before the elections. Time constraints precluded any effort on the author's part to avail herself subsequently of any other legal remedy.

The Committee's deliberations concerning admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

6.2 The Committee observes that the State party contests the admissibility of the communication on the grounds that domestic remedies have not been exhausted, since the author did not contest the SLB's conclusion that her knowledge of the language was not of the required standard, but contested the Election Commission's decision to strike her off the list. The Committee cannot agree with the State party's argument that this shows that the author had not exhausted the available remedies, since at the time the author was in possession of a valid, legally issued certificate demonstrating her knowledge of the official language to the required standard, which the State party itself does not contest.

6.3 The Committee also notes counsel's arguments that the remedies listed by the State party are not effective remedies and that the State party has not proved that they are effective or indeed contested counsel's arguments. The Committee also takes account of counsel's comment that the remedies listed by the State party take several months to reach a conclusion in any case and to have exhausted them would have meant that the author would not have been able to stand in the elections. The Committee notes that counsel's reactions were brought to the attention of the State party, but that the latter did not respond. Under the circumstances, the Committee considers that there is no impediment to the admissibility of the communication.

6.4 The Committee therefore declares the communication admissible and decides to proceed to an examination of the case on its merits, in accordance with article 5, paragraph 2, of the Optional Protocol.

Examination of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information submitted to it in writing by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The issue before the Committee is whether the rights of the author under articles 2 and 25 were violated by not allowing her to stand as candidate for the local elections held in March 1997.

7.3 According to the State party participation in public affairs requires a high level of proficiency in the State language and a language requirement for standing as a candidate in elections is hence reasonable and objective. The Committee notes that article 25 secures to every citizen the right and the opportunity to be elected at genuine periodic elections without any of the distinctions mentioned in article 2, including language.

7.4 The Committee notes that, in this case, the decision of a single inspector, taken a few days before the elections and contradicting a language aptitude certificate issued some years earlier, for an unlimited period, by a board of Latvian language specialists, was enough for the Election Commission to decide to strike the author off the list of candidates for the municipal elections. The Committee notes that the State party does not contest the validity of the certificate as it relates to the author's professional position, but argues on the basis of the results of the inspector's review in the matter of the author's eligibility. The Committee also notes that the State party has not contested counsel's argument that Latvian law does not provide for separate levels of proficiency in the official language in order to stand for election, but applies the standards and certification used in other instances. The results of the review led to the author's being prevented from exercising her right to participate in public life in conformity with article 25 of the Covenant. The Committee notes that the first examination, in 1993, was conducted in accordance with formal requirements and was assessed by five experts, whereas the 1997 review was conducted in an ad hoc manner and assessed by a single individual. The annulment of the author's candidacy pursuant to a review that was not based on objective criteria and which the State party has not demonstrated to be procedurally correct is not compatible with the State party's obligations under article 25 of the Covenant.

7.5 The Committee concludes that Mrs. Ignatane has suffered specific injury in being prevented from standing for the local elections in the city of Riga in 1997, because of having been struck off the list of candidates on the basis of insufficient proficiency in the official language. The Human Rights Committee considers that the author is a victim of a violation of article 25, in conjunction with article 2 of the Covenant

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Ms. Ignatane with an effective remedy. It is also under an obligation to take steps to prevent similar violations occurring in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

T. Communication No. 930/2000 Winata v. Australia (Views adopted on 26 July 2001, seventy-second session)*

Submitted by:	Mr. Hendrick Winata and Ms. So Lan Li (represented by counsel, Anne O'Donoghue)
Alleged victims:	The authors and their son, Barry Winata
State party:	Australia
Date of communication:	11 May 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2001,

Having concluded its consideration of communication 930/2000 submitted to the Human Rights Committee by Mr. Hendrick Winata and Ms. So Lan Li under the Optional Protocol to the International Covenant on Civil and Political Rights.

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 4 May 2000, are Hendrik Winata, born 9 November 1954 and So Lan Li, born 8 December 1957, both formerly Indonesian nationals but currently stateless, also writing on behalf of their son Barry Winata, born on 2 June 1988 and an Australian national. The authors complain that the proposed removal

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

Under rule 85 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the case.

The text of a dissenting individual opinion signed by Committee members Prafullachandra Natwarlal Bhagwati, Ahmed Tawfik Khalil, David Kretzmer and Max Yalden is appended to the present document.

of the parents from Australia to Indonesia would constitute a violation of articles 17, 23, paragraph 1, and 24, paragraph 1, of the Covenant by the State party. They are represented by counsel.

The facts as presented

2.1 On 24 August 1985 and 6 February 1987, Mr. Winata and Ms. Li arrived in Australia on a visitor's visa and a student visa respectively. In each case, after expiry of the relevant visas on 9 September 1985 and 30 June 1988 respectively they remained unlawfully in Australia. In Australia Mr. Winata and Ms. Li met and commenced a de facto relationship akin to marriage, and have a 13-year-old son, Barry, born in Australia on 2 June 1988.

2.2 On 2 June 1998, by virtue of his birth in that country and residing there for 10 years, Barry acquired Australian citizenship. On 3 June 1998, Mr. Winata and Ms. Li lodged combined applications for a protection visa with the Department of Immigration and Multicultural Affairs (DIMA), based generally upon a claim that they faced persecution in Indonesia owing to their Chinese ethnicity and Catholic religion. On 26 June 1998, the Minister's delegate refused to grant a protection visa.

2.3 On 15 October 1998,[1] Mr. Winata and Ms. Li's representative in Jakarta lodged an application with the Australian Embassy to migrate to Australia on the basis of a "subclass 103 Parent Visa". A requirement for such a visa, of which presently 500 are granted per year, is that the applicant must be outside Australia when the visa is granted. According to counsel, it thus could be expected that Mr. Winata and Ms. Li would face a delay of several years before they would be able to return to Australia under parent visas.

2.4 On 25 January 2000, the Refugee Review Tribunal (RRT) affirmed DIMA's decision to refuse a protection visa. The RRT, examining the authors' refugee entitlements under article 1A (2) of the Convention Relating to the Status of Refugees (as amended) only, found that even though Mr. Winata and Ms. Li may have lost their Indonesian citizenship having been absent from that country for such a long time, there would be little difficulty in re-acquiring it.[2] Furthermore, on the basis of recent information from Indonesia, the RRT considered that while the possibility of being caught up in racial and religious conflict could not be discounted, the outlook in Indonesia was improving and any chance of persecution in the particular case was remote. The RRT specifically found that its task was solely limited to an examination of a refugee's entitlement to a protection visa, and could not take into account broader evidence of family life in Australia.

2.5 On the basis of legal advice that any application for judicial review of the RRT's decision had no prospects of success, Mr. Winata and Ms. Li did not seek review of the decision. With the passing of the mandatory and non-extendable filing period of 28 days from the decision having now passed, Mr. Winata and Ms. Li cannot pursue this avenue.

2.6 On 20 March 2000,[3] Mr. Winata and Ms. Li applied to the Minister for Immigration and Multicultural Affairs, requesting the exercise in their favour on compelling and compassionate grounds of his non-enforceable discretion.[4] The application, relying inter alia on articles 17 and 23 of the Covenant, cited "strong compassionate circumstances such that failure to recognize them would result in irreparable harm and continuing hardship to an Australian family". The application was accompanied by a two and a half page psychiatric report on the authors and possible effects of a removal to Indonesia.[5] On 6 May 2000, the Minister decided against exercising his discretionary power.[6]

The complaint

3.1 The authors allege that their removal to Indonesia would violate rights of all three alleged victims under articles 17, 23, paragraph 1, and 24, paragraph 1.

3.2 As to the protection of unlawful or arbitrary interference with family life, protected under article 17, the authors argue that de facto relationships are recognized under Australian law, including in migration regulations, and that there should be no doubt that their relationship would be so recognized by the Australian courts. Their relationship with Barry would also be recognized as a "family" by Australia. They contend that it is clear from the psychiatric report that there is strong and effective family life.

3.3 The authors contend that a removal which separates parents from a dependent child, as is claimed could occur in this case if Barry were to remain in Australia, amounts to an "interference" with that family unit. While conceding that the removal of Mr. Winata and Ms. Li is lawful under domestic law by virtue of the Migration Act, the authors cite the Committee's General Comment 16 to the effect that any interference must also be in accordance with the provisions, aims and objectives of the Covenant and be reasonable in the particular circumstances.

3.4 The authors claim that if they are to be removed, the only way to avoid their separation from Barry is for him to leave with them and relocate to Indonesia. They claim however that Barry is fully integrated into Australian society, speaks neither Indonesian nor Chinese, and has no cultural ties to Indonesia since he has always lived in Australia. Barry is described by the psychologist's report as "an Inner Western Sydney multicultural Chinese Australian boy, with all the best characteristics of that culture and subculture [who] would be completely at sea and at considerable risk if thrust into Indonesia". Alternatively, the authors contend it would be unconscionable and very damaging to break up the family unit and set Barry adrift in Australia them if he was to be left there while they returned to Indonesia. Either way, say the authors, the removal would be arbitrary and unreasonable.

3.5 In coming to this conclusion, the authors refer to the jurisprudence of the European Court of Human Rights, which in its interpretation of the analogous article 8 of the European Convention has been generally restrictive towards those seeking entry into a State for purposes of "family creation", while adopting a more liberal approach to existing families already present in the State. The authors urge that a similar approach be taken by the Committee, while arguing that the right in article 17 of the Covenant is stronger than article 8 of the European Convention in that it is not expressed as subject to any conditions, and that therefore the individual's right to family life will be paramount rather than balanced against any State right to interfere with the family.

3.6 As to articles 23 and 24, the authors do not develop any specific argumentation other than to observe that article 23 is expressed in stronger terms than article 12 of the European Convention, and that article 24 specifically addresses the protection of the rights of the child as such or as a member of a family.

The State party's observations with regard to the admissibility and merits of the communication

4.1 The State party argues that the authors' claims are inadmissible for failure to exhaust domestic remedies, for incompatibility with provisions of the Covenant, and (in part) for insufficient substantiation.

4.2 As to non-exhaustion of domestic remedies, the State party submits that three remedies remain available and effective. Firstly, the authors failed to seek, as provided for in the Migration Act, judicial review in the Federal Court (along with subsequent possible appeals) of the RRT's decision of 25 January 2000. Although the time has now passed for bringing such an application, the State party refers to the Committee's decision in N.S. v. Canada[7] that a failure to exhaust a remedy in time means that available domestic remedies have not been exhausted. Secondly, the authors could apply by way of constitutional remedy for judicial review in the High Court, which could direct the RRT to reconsider the matter according to law if a relevant error of law is established. The State party notes the Committee's jurisprudence that mere doubts as to the effectiveness of a remedy does not absolve an author from pursuing them. In the absence of the legal advice provided to the authors that an application for judicial review would have no prospects of success, the authors cannot be said to have convincingly demonstrated that these remedies would not be effective.

4.3 Finally, the State party notes that the authors have applied for parent visas. While the authors would have to leave the country to await the grant of the visa and would be "queued" with other applicants, they would not have to wait an indefinite period. Barry could live with the authors in Indonesia until the visas were granted, or continue his schooling in Australia.

4.4 As to incompatibility with the provisions of the Covenant, the State party argues that the authors' allegations do not come within the terms of any right recognized by the Covenant. The State party argues that the Covenant recognizes, in articles 12, paragraph 1, and 13, the right of State parties to regulate the entry of aliens into their territories. If the authors are removed from Australia it will be due to the fact that they have illegally remained in Australia after the expiry of their visas. The Covenant does not guarantee the authors the right to remain in Australia or to establish a family here after residing in Australia unlawfully and knowingly.

4.5 As to non-substantiation of the allegations, the State party contends that in relation to articles 23, paragraph 1, and 24, paragraph 1, the authors have provided insufficient evidence to substantiate their claims. The authors simply allege that the State party would breach these provisions if it removed them, but they provide no details in respect of these allegations. The State party states that both the nature of these particular allegations and the way in which the evidence provided relates to them is unclear from the communication. The evidence and argument supplied relates only to article 17.

4.6 As to the merits of the claim under article 17, the State party notes at the outset its understanding of the scope of the right in that article. Unlike the corresponding provision of the European Convention, limitations on article 17 are not limited to those "necessary" to achieve a prescribed set of purposes, but, more flexibly, must simply be reasonable and not arbitrary in relation to a legitimate Covenant purpose. The State party refers to the travaux préparatoires of the Covenant which are clear that the intent was that States parties should not be unnecessarily restricted by a list of exceptions to article 17, but should be able to determine how the principle should be given effect to.[8]

4.7 Turning to the particular case, the State party, while not objecting to the classification of the authors as a "family", argues that the removal of the authors would not constitute "interference" with that family, and that in any event such a step would not be arbitrary or unreasonable in the circumstances.

4.8 As to "interference", the State party argues that if the authors were removed, it would take no steps to prevent Barry also leaving with them to live in Indonesia, where the family could continue to live together. There is no evidence that they would be unable to live as a family, and the RRT found no danger of persecution for them. While acknowledging a disruption to Barry's education in this event, the State party contends this does not amount to "interference with family".[9] It points out that it is common for children of all ages to relocate with parents to new countries for various reasons.

4.9 The State party observes that Barry has no relatives in Australia other than his parents, whereas there are a significant number of close relatives in Indonesia, with whom the authors stay in contact with and who would if anything enhance Barry's family life. The State party submits therefore that, like the European Convention, the Covenant should be construed not so as to guarantee family life in a particular country, but simply to effective family life, wherever that may be.

4.10 Alternatively, if Barry were to remain in Australia, the family would be able to visit him and in any case maintain contact with him. This is the same situation as many children face at boarding schools, and such physical separation cannot mean that the family unit does not exist. In any event, the decision as to which of these options the parents elect is purely theirs and not the result of the State party's actions, and therefore does not amount to "interference". Moreover, whatever the decision, the State party will do nothing to prevent the family's relations from continuing and developing.

4.11 Even if the removal can be considered an interference, the State party submits, the action would not be arbitrary. The authors came to Australia on short-term visas fully aware that they were required to leave Australia when the visas expired. Their removal will be the result of the applicants having overstayed their visas which they were aware only allowed temporary residence, and remaining unlawfully in Australia for over 10 years.[10] The laws which require their removal in these circumstances are well-established and generally applicable. The operation of these laws regulating removal is neither capricious nor unpredictable, and is a reasonable and proportionate means of achieving a legitimate purpose under the Covenant, that is immigration control.

4.12 In the circumstances, the authors knew when Barry was born that that there was a risk that they would not be able to remain and raise Barry in Australia. It has not been shown that there are any significant obstacles to establishing a family in Indonesia, and they will be re-granted Indonesian citizenship if they apply for it. Both authors received their schooling in Indonesia, speak, read and write Indonesian and have worked in Indonesia. They will be able to raise Barry in a country whose language and culture they are familiar with, close to other family members. Barry understands a significant amount of domestic Indonesian, and hence any language barrier that Barry would face would be fairly minor and, given his young age, could be quite easily overcome. Nor would it be unreasonable if the authors elected for him to remain in Australia, for he would be able to maintain contact with his parents and have access to all the forms of support provided to children separated from their parents.

4.13 Further evidence of the reasonableness of removal is that the authors' requests for protection visas were determined on their facts according to law laying down generally applicable, objective criteria based on Australia's international obligations, and confirmed upon appeal. In due course, the authors' applications for parent visas will be made according to law, and it is reasonable that the authors' request be considered along with others making similar claims.

4.14 The State party refers to the Committee's jurisprudence where it has found no violation of article 17 (or article 23) in deportation cases where the authors had existing families in the receiving State.[11] Furthermore, a factor of particular weight is whether the persons in question had a *legitimate* expectation to continuing family life in the particular State's territory. The cases decided before the European Court support such a distinction between cases of families residing in a State lawfully and unlawfully respectively.

4.15 By way of example, in Boughanemi v. France[12] the European Court found the applicants' deportation compatible with article 8 where he had been residing in France illegally, even though he had an existing family in France. In the circumstances of Cruz Varas v. Sweden,[13] similarly, the Court found expulsion of illegal immigrants compatible with article 8. In Bouchelka v. France,[14] where the applicant had returned to France *illegally* after a deportation and built up a family (including having a daughter), the Court found no violation of article 8 in his renewed deportation. By contrast, in Berrehab v. The Netherlands,[15] the Court found a violation in the removal of the father of a young child from the country where the child lived where the father had *lawfully* resided there for a number of years.[16]

4.16 Accordingly, the State party argues that the element of unlawful establishment of a family in a State is a factor weighing heavily in favour of that State being able to take action which, if the family had been residing lawfully in the State, might otherwise have been contrary to article 17. As the European Court has noted, article 8 of the European Convention does not guarantee the most suitable place to live,[17] and a couple cannot choose the place of residence for its family simply by *unlawfully* remaining in the State it wishes to raise its family and having children in that State. It follows that the authors, residing in Australia unlawfully and fully aware of the risk that they might not be able to remain and raise a family in Australia, cannot reasonably expect to remain in Australia, and their removal is not arbitrary contrary to article 17.

4.17 As to article 23, paragraph 1, the State party refers to the institutional guarantees afforded by that article.[18] It states that the family is a fundamental social unit and its importance is given implicit and explicit recognition, including by allowing parents to apply for visas so they can live with their children in Australia (as the authors have done) and providing parents special privileges compared to other immigrants. Article 23, like article 17, must be read against Australia's right, under international law, to take reasonable steps to control the entry, residence and expulsion of aliens. As the RRT found the authors are not refugees and do not suffer a real chance of harm in Indonesia,[19] and as Barry can remain in Australia attending education or return to Indonesia at the authors' discretion, the existence of the family would not be threatened or harmed in the event of a return.

4.18 As to article 24, paragraph 1, the State party refers to a number of legislative measures and programmes designed specifically to protect children and to provide assistance for children at risk.[20] The removal of the authors from Australia is not a measure directed at Barry, who as an Australian citizen (since June 1998 only) is entitled to reside in Australia, regardless of where his parents live. The authors' removal would be a consequence of them residing in Australia illegally, rather than a failure to provide adequate measures of protection for children. When Barry was born, the authors were fully aware of the risk that they would one day have to return to Indonesia.

4.19 The State party argues that removal of the authors would neither involve a failure to adequately protect Barry as a minor or harm him. Both the delegate of the Minister for Immigration and Multicultural Affairs and the RRT found that there was no more than a remote risk that the authors would face persecution in Indonesia, and no evidence has been presented to suggest that Barry would be at any greater risk of persecution if he went to Indonesia with his parents.

4.20 Adopting its argumentation under article 17 on "interference" with the family, the State party argues that there are no significant obstacles to Barry continuing a normal life in Indonesia with his family. The State party disputes the psychiatric opinion to the effect that if Barry returned with the authors he would be "completely at sea and at considerable risk if thrust into Indonesia". It argues that while the interruption to Barry's routine may make the move to Indonesia difficult for him at first, his age, multicultural background[21] and understanding of Indonesian mean he is likely to adjust quickly. Barry could continue a good schooling in Indonesia in the physical and emotional company of the authors (who were born, raised and lived most of their lives there) and other close relatives; alternatively, if he chooses, as an Australian citizen he would also be entitled to complete his high schooling and tertiary education in Australia. While this would mean separation from the authors, it is common for children not to live with their parents during high school and while attending tertiary education, and it is common for children and young adults from south-east Asian countries to attend school and university in Australia. As an Australian citizen, he would be protected to the full extent possible under Australian law and would receive the same protection which is given to other Australian children who are living in Australia without their parents.

Author's comments on the State party's submissions

5.1 As to the admissibility of the communication, the author contests the State party's contentions on exhaustion of local remedies, incompatibility with the Covenant and insufficient substantiation.

5.2 Regarding the exhaustion of local remedies, the author argues that the requirement to exhaust domestic remedies must mean that the *particular complaint* is presented to any available State organs before that complaint is presented to the Committee. The remedies claimed by the State party still to be available relate to the refugee process and its evaluations of fear of persecution. Yet the complaint here is not related to any refugee issues, bur rather concerns the interference with family life caused by the removal of the authors. Accordingly, the author submits that there can be no requirement to pursue a refugee claim when the complaint relates to family unity.

5.3 As for the joint parent visa application, the author notes that the authors would have to leave Australia pending determination of the application where, even if successful, they would have to remain for several years before returning to Australia. In any event, Department of Immigration statistics show that no parent visas at all were issued by the Australian authorities in Jakarta between 1 September 2000 and 28 February 2001, and the average processing time worldwide for such visas is almost four years. In view of current political disputes regarding these visas, these delays will by the State party's own admission increase.[22] The author regards such delays as clearly unacceptable and manifestly unreasonable.

5.4 As to the State party's submissions that the authors' allegations are incompatible with the provisions of the Covenant, in particular articles 12, paragraph 1, and 13, the authors refer to the Committee's General Comment 15. That states that while the Covenant does not recognize a right of aliens to enter or reside in a State party's territory, an alien may enjoy the protection of the Covenant even in relation to entry or residence where, inter alia, issues of respect for family life arise. The authors consider article 13 not relevant to this context.

5.5 The authors object to the State party's argument that the claim of violation of articles 23, paragraph 1, and 24, paragraph 1, have not been substantiated. The authors state that the facts of the claim relate to those provisions in addition to article 17, and argue that a breach of article 17 may also amount to a breach of the institutional guarantees in articles 23 and 24.

5.6 On the merits, the authors regard the State party's primary submission to be that there is no reason why Barry could not return to Indonesia to live with them if they are removed. The authors contend this is inconsistent with the available psychological evidence provided to the Minister and attached to the communication. The authors also claim, in respect of the suggestion that Barry remain (unsupervised) in Australia pending the outcome of their application for re-entry, that this would be clearly impractical and not in Barry's best interests. The authors do not have access to the funds required for Barry to study at boarding school, and there is no one available to take over Barry's care in their absence.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As to the State party's arguments that available domestic remedies have not been exhausted, the Committee observes that both proposed appeals from the RRT decision are further steps in the refugee determination process. The claim before the Committee, however, does not relate to the authors' original application for recognition as refugees, but rather to their separate and distinct claim to be allowed to remain in Australia on family grounds. The State party has not provided the Committee with any information on the remedies available to challenge the Minister's decision not to allow them to remain in Australia on these grounds. The processing of the authors' application for a parent visa, which requires them to leave Australia for an appreciable period of time, cannot be regarded as an available domestic remedy against the Minister's decision. The Committee therefore cannot accept the State party's argument that the communication is inadmissible for failure to exhaust domestic remedies.

6.3 As to the State party's contention that the claims are in essence claims to residence by unlawfully present aliens and accordingly incompatible with the Covenant, the Committee notes that the authors do not claim merely that they have a right of residence in Australia, but that by forcing them to leave the State party would be arbitrarily interfering with their family life. While aliens may not, as such, have the right to reside in the territory of a State party, States parties are obliged to respect and ensure all their rights under the Covenant. The claim that the State party's actions would interfere arbitrarily with the authors' family life relates to an alleged violation of a right which is guaranteed under the Covenant to all persons. The authors have substantiated this claim sufficiently for the purposes of admissibility and it should be examined on the merits.

6.4 As to the State party's claims that the alleged violations of article 23, paragraph 1, and article 24, paragraph 1, have not been substantiated, the Committee considers that the facts and arguments presented raise cross-cutting issues between all three provisions of the Covenant. The Committee considers it helpful to consider these overlapping provisions in conjunction with each other at the merits stage. It finds the complaints under these heads therefore substantiated for purposes of admissibility.

6.5 Accordingly, the Committee finds the communication admissible as pleaded and proceeds without delay to a consideration of its merits. The Committee has considered the communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 As to the claim of violation of article 17, the Committee notes the State party's arguments that there is no "interference", as the decision of whether Barry will accompany his parents to Indonesia or remain in Australia, occasioning in the latter case a physical separation, is purely an issue for the family and is not compelled by the State's actions. The Committee notes that there may indeed be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of a family is *entitled* to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.

7.2 In the present case, the Committee considers that a decision of the State party to deport two parents and to compel the family to choose whether a 13-year old child, who has attained citizenship of the State party after living there 10 years, either remains alone in the State party or accompanies his parents is to be considered "interference" with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case. The issue thus arises whether or not such interference would be arbitrary and contrary to article 17 of the Covenant.

7.3 It is certainly unobjectionable under the Covenant that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits. Nor is the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later time, sufficient of itself to make a proposed deportation of one or both parents arbitrary. Accordingly, there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances. In the present case, both authors have been in Australia for over fourteen years. The authors' son has grown in Australia from his birth 13 years ago, attending Australian schools as an ordinary child would and developing the social relationships inherent in that. In view of this duration of time, it is incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness. In the particular circumstances, therefore, the Committee considers that the removal by the State party of the authors would constitute, if implemented, arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the alleged victims, and, additionally, a violation of article 24, paragraph 1, in relation to Barry Winata due to a failure to provide him with the necessary measures of protection as a minor.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the removal by the State party of the authors would, if implemented, entail a violation of articles 17, 23, paragraph 1, and 24, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State Party is under an obligation to provide the authors with an effective remedy, including refraining from removing the authors from Australia before they have had an opportunity to have their application for parent visas examined with due consideration given to the protection required by Barry Winata's status as a minor. The State party is under an obligation to ensure that violations of the Covenant in similar situations do not occur in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The State party's chronology provides the date for this event as 20 October 1998.

[2] The authors have not contested that re-acquisition of Indonesian citizenship would be unproblematic.

[3] The State party's chronology provides the date for this event as 20 October 1998.

[4] Under section 417 of the Migration Act, the Minister may substitute the decision of the RRT with a more favourable one if it is considered in the public interest to do so.

[5] The report, on file with the Secretariat, states in relation to the family's life in Australia that (i) Barry is having a normal upbringing and education, has "several fairly close friends", understands (but apparently does not speak) Indonesian, and (ii) the family is a strong and close one in the Chinese tradition, but outgoing and with a variety of multicultural friendships through work, church and social life. The report also refers to refugee issues relating to the family history which are not pursued in the present communication.

[6] The authors were formally advised of the Minister's decision on 17 May 2000, postdating the dispatch of the communication to the Committee on 11 May 2000.

[7] Communication 26/1978, declared inadmissible on 28 July 1978.

[8] Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), at 347.

[9] The State party refers to the decision of the European Commission of Human Rights in Family X v. the United Kingdom (Decisions and Reports of the European Commission of Human Rights 30 (1983)), which found that the fact that expulsion would prevent the son from continuing his education in the United Kingdom did not constitute an interference with the right to respect for family life.

[10] The 10-year period does not include the time the authors have been allowed to remain in Australia while they seek to legalize their status.

[11] Stewart v. Canada (Comm. 538/1993) and Canepa v. Canada (Comm. 558/1993).

[12] (1996) 22 EHRR 228.

[13] Judgement of 20 March 1991 (Case 46/1990/237/307).

[14] Judgement of 27 January 1997.

[15] (1988) 11 EHRR 322.

[16] The State party points out that in that case, unlike the present circumstances, the proposed action would have split the two *parents* between two countries.

[17] Ahmut v. The Netherlands (Application No. 21702/93, judgement of 28 November 1996).

[18] Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel (1993) at 460.

[19] The refugee application, so the State party, shows that Mr. Winata was never arrested, detained, imprisoned, interrogated or mistreated in Indonesia, nor that his property was damaged.

[20] Reference is made to its *Third Periodic Report under the International Covenant on Civil and Political Rights*, at paras. 323-332 and 1193.

[21] The State party refers to the psychiatric report's classification of Barry as a "multicultural Chinese Australian boy".

[22] The author supplies a copy of a media release of 11 October 2000 by the Minister for Immigration and Multicultural Affairs to this effect.

APPENDIX

Individual opinion by Committee members Prafullachandra Natwarlal Bhagwati, Tawfik Khalil, David Kretzmer and Max Yalden (dissenting)

1. The question in this communication is neither whether the case of the authors and their son arouses sympathy, nor whether Committee members think it would be a generous gesture on the part of the State party if it were to allow them to remain in its territory. It is only whether the State party is legally bound under the terms of the International Covenant on Civil and Political Rights to refrain from requiring the authors to leave Australia. We cannot agree with the Committee's view that the answer to this question should be in the affirmative.

2. The Committee bases its Views on three articles of the Covenant: articles 17, paragraph 1, in conjunction with article 23, and article 24. The authors provided no information whatsoever on measures of protection that the State party would be required to take in order to comply with its obligations under the latter article. Many families the world over move from one country to another, even when their children are of school age and are happily integrated in school in one country. Are States parties required to take measures to protect children against such action by their parents? It seems to us that a vague value judgement that a child might be better off if some action were avoided does not provide sufficient grounds to substantiate a claim that a State party has failed to provide that child with the necessary measures of protection required under article 24. We would therefore have held that the authors failed to substantiate, for the purposes of admissibility, their claim of a violation of article 24, and that this part of the communication should therefore have been held inadmissible under article 2 of the Optional Protocol.

3. As far as the claim of a violation of article 17 is concerned, we have serious doubts whether the State party's decision requiring the authors to leave its territory involves interference in their family. This is not a case in which the decision of the State party results in the inevitable separation between members of the family, which may certainly be regarded as interference with the family.[22] Rather the Committee refers to "substantial changes to long-settled family life." While this term does appear in the jurisprudence of the European Court of Human Rights,[22] the Committee fails to examine whether it is an appropriate concept in the context of article 17 of the Covenant, which refers to interference in the family, rather than to respect for family life mentioned in article 8 of the European Convention. It is not at all evident that actions of a State party that result in changes to long-settled family life involve interference in the family, when there is no obstacle to maintaining the family's unity. We see no need to express a final opinion on this question in the present case, however, as even if there is interference in the authors' family, in our opinion there is no basis for holding that the State party's decision was arbitrary.

4. The Committee provides no support or reasoning for its statement that in order to avoid characterization of its decision as arbitrary the State party is duty-bound to provide additional factors besides simple enforcement of its immigration laws. There may indeed be exceptional cases in which the interference with the family is so strong that requiring a family member who is unlawfully in its territory to leave would be disproportionate to the interest of the State party in maintaining respect for its immigration laws. In such cases it may be possible to characterize a decision requiring the family member to leave as arbitrary. However, we cannot accept that the

mere fact that the persons unlawfully in the State party's territory have established family life there requires a State party to "demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness." The implications of this interpretation, adopted by the Committee, are that if persons who are unlawfully in a State party's territory establish a family and manage to escape detection for a long enough period they in effect acquire a right to remain there. It seems to us that such an interpretation ignores prevailing standards of international law, which allow States to regulate the entry and residence of aliens in their territory.

5. As stated above, the State party's decision in no way forces separation among family members. While it may indeed be true that the authors' son would experience adjustment difficulties if the authors were to return with him to Indonesia, these difficulties are not such as to make the State party's decision to require the authors to leave its territory disproportionate to its legitimate interest in enforcing its immigration laws. That decision cannot be regarded as arbitrary and we therefore cannot concur in the Committee's view that the State party has violated the rights of the authors and their son under articles 17 and 23 of the Covenant.

6. Before concluding this opinion we wish to add that besides removing any clear meaning from the terms "interference with family" and "arbitrary", used in article 17, it seems to us that the Committee's approach to these terms has unfortunate implications. In the first place, it penalizes States parties which do not actively seek out illegal immigrants so as to force them to leave, but prefer to rely on the responsibility of the visitors themselves to comply with their laws and the conditions of their entry permits. It also penalizes States parties, which do not require all persons to carry identification documents and to prove their status every time they have any contact with a state authority, since it is fairly easy for visitors on limited visas to remain undetected in the territory of such States parties for long periods of time. In the second place, the Committee's approach may provide an unfair advantage to persons who ignore the immigration requirements of a State party and prefer to remain unlawfully in its territory rather than following the procedure open to prospective immigrants under the State party's laws. This advantage may become especially problematical when the State party adopts a limited immigration policy, based on a given number of immigrants in any given year, for it allows potential immigrants to "jump the queue" by remaining unlawfully in the State party's territory.

(Signed) Prafullachandra Natwarlal Bhagwati

(Signed) Ahmed Tawfik Khalil

(Signed) David Kretzmer

(Signed) Max Yalden

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Annex XI

DECISIONS OF THE HUMAN RIGHTS COMMITTEE DECLARING COMMUNICATIONS INADMISSIBLE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 762/1997, Jensen v. Australia, (Decision adopted on 22 March 2001, seventy-first session)*

Submitted by:	Mr. Michael Jensen
Alleged victim:	Author
State party:	Australia
Date of communication:	2 April 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 2001,

Adopts the following:

Decision on admissibility

1. The author of the communication, initially dated 2 April 1996, is Michael Jensen, an Australian national, born 26 November 1947. He is currently imprisoned at Karnet Prison Farm, Western Australia. He claims to be a victim of a violation by Australia of article 2, paragraphs 3 (a) and (c), article 7, article 9, paragraphs 1, 2 and 3, article 10, paragraphs 1 and 3, article 14, paragraphs 3 (a) and (c), and article 15, paragraph 1, of the Covenant. He is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden. Under rule 85 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the case.

The facts as presented

2.1 On 29 August 1990, the author was convicted in the Supreme Court of Western Australia for raping and sexually assaulting a psychiatric patient in his care in a psychiatric hospital in Western Australia (WA) in 1989 (the WA offences). He was sentenced to nine years in prison. The earliest date the author would be eligible for consideration for parole was 30 November 1994.

2.2 In the course of investigating those offences, the police discovered videotape and photographic evidence in the author's home of further offences involving the author raping and 10 times indecently dealing with a 7-year-old girl and three times indecently dealing with her 10-year-old sister in Queensland in 1985 ("the Queensland offences"). The author states that the mother of the minors was aware of that conduct at the time, but subsequently declined to lay charges against the author as he had moved to WA.

2.3 On 31 July 1990, while the author was still on remand for the WA offences, the police attempted to interview the author about the videotape and photographic evidence of the Queensland offences. The police informed the author of the contents of the videotape, the victims' identity and that a complaint had been received by police. On the advice of his solicitor, the author refused to take part in the interview. During the interview, police told the author that an application to extradite him to Queensland would be made upon his release from prison.

2.4 At a WA Sentence Planning Conference held in October 1990, the author asked and was told that there were no warrants for his arrest in any State of Australia. On 6 March 1991, the Perth District Court sentenced the author to one year's imprisonment, to be served cumulatively upon his nine year sentence, for four offences of breaking and entering various police stations in Western Australia in attempts to obtain or destroy videotape and photographic evidence of the Queensland offences.

2.5 In September 1991, at another WA Sentence Planning Conference, the author again asked and was told that there were no warrants for his arrest in any State of Australia.
On 14 October 1992, the author was shown a copy of a letter dated 13 August 1992 from the Queensland police to the Corrective Services department at Perth, indicating that a warrant had been issued against the author on a charge of rape committed in Queensland in 1985. The letter also indicated that extradition proceedings would be commenced upon the author's release from prison. The warrant, which had been prepared in August 1992, was unsigned due to human error and therefore invalid as a matter of law.

2.6 The author's counsel requested a copy of the warrant and full details of all the charges against the author. In January, a copy of a properly issued warrant was provided, dated 7 January 1993, against the author for the offence of rape of a female minor in Queensland in 1985. No factual circumstances were set out in the warrant, and nor were any other offences mentioned.

2.7 On 5 April 1993, the author made a written request to the competent authorities for his interstate transfer to Queensland to face the Queensland charge. On 23 August 1993, the author commenced a Sex Offender Treatment Program in WA. On 14 March and 15 June 1994, the respective authorities in WA and Queensland approved the author's transfer to Queensland. On 30 June 1994, the author completed the treatment programme.

2.8 On 15 September 1994, the Freemantle Court of Petty Sessions ordered the transfer of the author to Queensland. The statutory period for a review of that decision expired on 29 September 1994. The following day, on 30 September 1994, the author formally purported to withdraw his application for an interstate transfer on the grounds of delay. On 17 October 1994, the author was transferred to Queensland, and, upon arrival, arrested and charged with rape of a female minor and additionally 13 charges of indecent dealing. On 18 October, the author was brought before the Brisbane Magistrates Court in relation to the charges of the previous day, and proceedings were adjourned for hearing of committal proceedings on 1 December 1994.

2.9 On 1 December 1994, the author appeared in the Brisbane Magistrates Court and was committed to stand trial in relation to the charges of 17 October 1994. On 8 May 1995, the author pleaded guilty to one count of rape and thirteen counts of indecent dealing with circumstances of aggravation in the Brisbane District Court. On 7 July 1995, the author was sentenced to five years' imprisonment for the rape, eighteen months imprisonment for each of six counts of indecent dealing and nine months imprisonment of for each of seven counts of indecent dealing, all sentences to be served concurrently. The district court made a recommendation that the author be eligible for consideration for parole after two years imprisonment. The term of imprisonment commenced immediately.

2.10 On 20 July 1995, the author submitted a written application to transfer back to WA on order to be closer to his family. Due to a pending appeal by the prosecution against sentence inter alia on the grounds of manifest inadequacy, the application could not be considered. On 2 April 1996, the author submitted his communication to the Human Rights Committee. On 11 June 1996, the Queensland Court of Appeal increased the sentence on the count of rape to 11 years, while allowing the other concurrent sentences for indecent dealing to stand. The revised sentence was backdated to begin from 7 July 1995, and had the result that five years of the sentences originally imposed for the WA offences would be served concurrently. The court recommended that the author be considered for parole after 29 August 1998.

2.11 On 12 June 1996, the author again submitted a written application to transfer back to WA on welfare grounds. On 13 August 1996, the author commenced a Queensland Sex Offender Treatment Program. On 7 October 1997, the author completed the Queensland treatment programme and received the necessary consents for interstate transfer. On 23 April 1998, the author was transferred interstate from Queensland back to prison in WA.

2.12 On 31 July and 18 August 1998, the WA Parole Board deferred consideration of the author's case, seeking further information. On 11 September 1998, the Parole Board denied parole due to the risk of re-offending due to the entrenched history of serious sexual offending and limited gains from the sex offender treatment programmes. On 13 November 1998, following a further psychological report, and again on 8 April 1999 and 28 April 2000 the Parole Board reconsidered the author's application for parole but denied it. Presently, the author remains in custody, with the Parole Board due to re-examine his case in April 2001.

The complaint

3.1 The author contends that, in violation of article 2, paragraphs 3 (a) and (c), he was denied an effective remedy to the violations he allegedly sustained, and alleges in particular that his performance in the treatment programmes was improperly evaluated and presented with the result that the Parole Board has denied parole.

3.2 The author contends that the delays in bringing him to trial for the Queensland offences violated his rights under articles 9, paragraphs 1, 2 and 3, and 14, paragraphs 3 (a) and (c). He argues that the police knew of the offences since 1990, that he made repeated attempts to determine whether he was facing charges, that a valid warrant was only issued in January 1993 and for one offence only, and that 13 further charges were added in October 1994.

3.3 The author alleges that his transfer to Queensland was deliberately delayed until shortly before he was eligible for consideration for parole. That conduct, combined with transferring him to Queensland after his request for a transfer had been withdrawn, meant that his detention in Queensland up to the time of sentencing was legally considered as a continuation of his WA sentence. This would not have been the case if he had been granted parole before facing the charges in Queensland. Accordingly, he considers that his detention was effectively extended by nine months, being the period between the transfer and the beginning of his sentence for the Queensland offences. The author contends that this constituted arbitrary detention under article 9, paragraph 1.

3.4 The author also contends that the delay first in charging him, then in transferring him to Queensland and in not transferring him back to Western Australia to be close to his family immediately after the Queensland trial was oppressive and led to undue emotional and psychological trauma, including depression and suicidal tendencies, along with insomnia, hair loss and exposure to chemotherapy. He claims that this amounts to a violation of article 7 of the Covenant.

3.5 The author states that while in prison he has followed intensive therapy and that the psychological reports show that he is unlikely to re-offend. The author argues that further imprisonment, after he was ready to be rehabilitated and reintegrated in society, for offences that happened 10 years ago, is detrimental to his rehabilitation and has led to heavy emotional and psychological stress. He thus claims a violation of article 10, paragraph 3, of the Covenant.

3.6 Finally, the author states that due to new legislation in Queensland, his sentence of 11 years' imprisonment with a three year non-parole period has been altered to an eight year and eight month non-parole period. He considers that now would make him eligible for release at the earliest in April 2004. The author claims that this constitutes a violation of article 15.

The State party's observations with regard to the admissibility of the communication

4.1 In terms of the alleged breaches of article 2, the State party understands that those rights to remedy are accessory in nature and apply consequent to a violation of a specific right in the Covenant. As the State party does not view any other violation as having been established, it argues that the author has failed to substantiate a claim of violation of article 2.

4.2 In terms of the alleged breaches of articles 7 and 10, paragraph 1, the State party refers to the Committee's jurisprudence for the proposition that for punishment to violate the Covenant it must humiliate, debase and in any event entail elements beyond the mere deprivation of liberty. The State party argues that at all points the author was lawfully deprived of his liberty and any mental suffering was ancillary to that. The State party states that, contrary to the author's allegations, clinical notes for the WA imprisonment show only periodic anxiety and mild depression from time to time, rather than chemotherapy, hair loss, insomnia or generally extreme psychological or emotional trauma. Similarly, during the Queensland imprisonment, a review showed possible depression as the only medical difficulty, and that pharmacological treatment was unnecessary. Accordingly, the State party considers this portion of the claim does not raise an issue in terms of the rights claimed, and is furthermore insufficiently substantiated. It therefore should be rejected as inadmissible.

4.3 In terms of the alleged violations of article 9, the State party records its understanding that the concept of "arbitrariness" in paragraph 1 encompasses elements of inappropriateness, injustice and lack of predictability. It also argues that the right in paragraph 2 to be promptly informed of charges relates only to the stage of arrest. Furthermore, the requirement that a person arrested or detained on criminal charges is promptly brought before a judge in paragraph 3 relates again to the time a person is arrested or detained on those particular charges.

4.4 The State party notes that, under its law, a person may be transferred from one State to another to face criminal charges once a person has been released from prison finally or on parole ("extradition") or alternatively at any time when a prisoner requests a transfer ("interstate transfer"). The State party notes that in July 1990 the author was informed that an application to extradite him to face the Queensland charges would be made upon his release from prison, but the author refused to answer questions concerning the offences. The State party observes that because the author was not due for consideration for parole until November 1994 at the earliest, the State party did not consider there was urgency in executing a warrant for the author's arrest. An invalid warrant was obtained in August 1992, and then a valid one in January 1993. At that point, in April 1993, the author requested to be transferred to Queensland to face the charges. Following the obtaining of the relevant authorities' consent in both States, a court hearing was held on whether a transfer order should be made.

4.5 The State party notes that its law provides that the court is not to make such an order, if on application of the prisoner, it is satisfied that it would be harsh or oppressive or not in the interests of justice for the transfer to proceed. The author had legal representation in this case, and the option to seek a review for a period of 14 days. Upon the expiry of that period, the Court's order was final and the author's withdrawal of his transfer request thereafter had no legal effect.

4.6 The State party accepts that the original warrant only noted one charge, and that the author was arrested on twelve more minor charges at the time of his arrival in Queensland. The State party states however that it is not unusual to issue a warrant on one charge, in this case the most serious one, while other charges are still being considered on the basis of what evidence might be available at that time. On the day the author arrived in Queensland in October 1994, the author was served with all 13 warrants. The next day he was brought before a Court. In December 1994, a preliminary hearing was held in December 1994 and a full hearing in March 1995. Finally, the State party notes that in the author's case, as usually occurs, the new sentence handed in Queensland was and is being served concurrently with the original sentence.

4.7 In relation to parole, the State party states that the WA Parole Board never had the question of the author's parole referred to it because the author had applied for the interstate transfer to Queensland. In any event, there is no automatic entitlement to parole at the time the question falls for consideration. An assessment is carefully made at the time as to the individual's progress and risk to the community at that time.

4.8 On the basis of the above facts, the State party contends that the author has no claim in relation to any of the three paragraphs of article 9. The author could validly have been detained under the original court sentence until 28 August 2000. He had not been considered for parole at the time of his transfer, much less received parole, and accordingly cannot claim that he was arbitrarily detained. Nor is there any evidence of deliberate delay at any point. As soon as the author was arrested, he was informed of the charges and promptly brought before a judge and then tried, as the Covenant requires. These allegations have not been substantiated by the author, and therefore also should be dismissed as inadmissible.

4.9 In terms of the author's allegation that his treatment has not had as its essential aim of his reformation and social rehabilitation, the State party observes that its penitentiary system has these aims, with a purpose to establish in prisoners the will to lead law-abiding and self-supporting lives after their release and to assist them to become fit to do so. Among a variety of other programmes, the Sex Offenders Treatment Programs in both WA and Queensland are aimed at rehabilitating person such as the author and reducing the frequency and extent of re-offending. The author unsuccessfully undertook the WA programme, which lead to him then completing the self-paced Queensland programme before his transfer back to WA. The possibility of interstate transfer on welfare grounds, as was requested by and granted to the author, is another dimension of a system designed to reform and rehabilitate to the extent possible.

4.10 The State party observes that both the Queensland District Court and Supreme Court found that the author did not successfully complete the WA programme. At all times this issue was before the courts, the author was legally represented and had the opportunity to cross-examine. Accordingly, this cannot found an argument for early release. The State party respectfully submits that the question of successful completion, or otherwise, of the programme is a question of fact beyond the Committee's role. The State party further notes that it was not unreasonable to require the author to finish the Queensland programme, in view of his earlier failure, before consideration was given to his transfer back to Western Australia. The State party's submissions predate the evaluation of the author's performance in the Queensland programme by the Parole Board and others. The State party accordingly argues that the author has not substantiated his claim in this regard and it should be dismissed as inadmissible.

4.11 In terms of the author's contentions that his rights under article 14 were violated, the State party records the Committee's General Comment on article 14 sets out that the right to be promptly informed of a charge requires that information to be given as soon as the charge is first made by the competent authority, that is, when the competent authority decides to take procedural steps against a suspected person or publicly names him as such. The European Court of Human Rights also has interpreted analogous due process rights to begin with the charge, or official notification given to an individual of an allegation that he has committed a criminal offence.

4.12 The State party argues, in relation to article 14, paragraph 3 (a), that the facts disclose a reasonable and proper effort being made to inform the author at all stages of investigation of the nature and cause of any charges against him. The author was aware since 1990 that the 1985 Queensland offences were being investigated. The author was made aware of the nature of the charges at the time he was first publicly named as being suspected of having committed those crimes, that is on 7 January 1993 when the warrant for his arrest on one charge of rape was issued. That was the most serious of the offences for which the author would later stand trial. The State party accordingly submits that this allegation has not been substantiated by the author and should be dismissed as inadmissible.

4.13 Concerning the author's contention of a violation of article 14, paragraph 3 (c), the State party rehearses the facts of the case. The State party emphasises that the author refused to cooperate with the police investigation in 1990. The earliest date the author could have been extradited upon conclusion of sentence was 11 November 1994, but a warrant was issued in January 1993. After the author's request for transfer in May 1993, the author completed a treatment programme, gained the necessary consents and was transferred in October 1994. He was immediately arrested and charged, and brought before a Court the next day. Over the next six weeks the author was provided legal counsel to prepare his defence. In December 1994, the author was committed to stand trial in June 1995, but in May 1995 the author plead guilty on all charges. In July 1995, he was sentenced, with the appeal being disposed of in July 1996.

4.14 The State party submits that the conduct of the authorities was determined by law, effected according to law and without irregularities, and did not contribute to any unnecessary delay in the trial of the author. The State party submits the time from being charged on 17 October 1994 to being sentenced on 7 July 1995, with the sentence being increased on appeal on 11 June 1996, is not an unreasonable time in the circumstances of this communication.

4.15 Finally, in relation to article 15, the State party points out that recent amendments to the Queensland sentencing regime are prospective only and do not affect the author. Accordingly, he has failed to substantiate a claim under article 15, and that portion should be dismissed as inadmissible.

Author's response to the State party's observations with regard to the admissibility of the communication

5.1 With respect to article 2, the author repeats allegations of deliberate concealment and fabrication by the authorities of his performance in the treatment programme, and thus submits that a case has been made out.

5.2 In relation to his claim under article 7, the author argues that deliberately false reports have increased his author's sentences beyond what was warranted. Taken with the delay in trial, the author submits a breach of article 7 is clear.

5.3 Regarding article 9, the author claims that he was not told at the interview in 1990 that charges would be laid upon his release, but only that the police would return for him in 10 years. He was not informed until 1992 that the Queensland charges were outstanding. The author states the Queensland police should not deliberately waited two years before informing the WA authorities of the charges. The author alleges that the police actions deprived him of parole, and accordingly his liberty.

5.4 The author argues that there is no justification for the delay of almost 5 years between the police investigations and charging him on the Queensland offences. Had the charges been laid earlier, the author states he would have been able to deal with the charges at an earlier point of his imprisonment. The author goes on to object in detail to the sentences imposed on him, and calculates that his claimed successful conclusion of the treatment programme would have resulted in parole being granted.

5.5 In terms of article 14, the author states again that at the 1990 interview no charges were mentioned, and there was no reference by the police to specific incidents. He notes that before 1992 he had been assured that no charges or extraditions were pending against him. The delays in processing the transfer to Queensland also unnecessarily prolonged resolution of the Queensland charges.

5.6 The author accepts the State party's submissions in respect to article 15 and withdraws that portion of his claim.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With respect to the author's contention that the authorities have inflicted torture or cruel, inhuman and degrading treatment contrary to article 7 and otherwise ill-treated the author contrary to article 10, paragraph 1, the Committee refers to its jurisprudence that a claim by a prisoner pursuant to these articles must demonstrate an additional exacerbating factor beyond the usual incidents of detention. In the present case, the author has failed to demonstrate, for the purposes of admissibility, that he has been treated in any way which departs from the normal treatment accorded a prisoner. This part of the communication is accordingly inadmissible under article 2 of the Optional Protocol.

6.3 In relation to the author's claims under article 9, paragraphs 1, 2 and 3, the Committee considers that the facts clearly demonstrate that as soon as the author was arrested on the Queensland offences, he was informed of the charges, brought before a court and then tried within a reasonable time thereafter. The author has accordingly failed to substantiate, for the purposes of admissibility, this portion of the claim, which is inadmissible under article 2 of the Optional Protocol.

6.4 Concerning the author's claims under article 10, paragraph 3, that the application of the penitentiary system in the author's case has not had as its essential aim his social rehabilitation and reformation, the Committee notes the variety of programmes and mechanisms in place in the State party's penitentiary system that are geared towards this end. The Committee considers that the author has failed to substantiate that the State party's assessments of the author's reformative progress, and of the consequences which ought to flow from that, raise issues of compliance with the requirements of article 10, paragraph 3. Accordingly, the Committee is of the view that the author has failed to substantiate, for the purposes of admissibility, his claim of a violation of article 10, paragraph 3, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.5 In terms of the author's allegations under article 14, paragraphs 3 (a) and (c), the Committee observes that the State party's law precluded the prisoner's transfer for trial before his release, which could have come no sooner than November 1994, unless a request for interstate transfer and appropriate court order was made. The author's request for transfer made after receiving notice of the most serious rape charge in 1993 was accommodated pursuant to an appropriate court order. Upon arrival, he was charged with the main offence and subsidiary offences, tried and convicted within appropriate time. The Committee considers that these facts fail to substantiate, for the purposes of admissibility, a claim under article 14, and this portion of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 With respect to the author's claims under article 2, the Committee considers that the author's contentions in this regard do not raise issues additional to those considered under the other articles which have been invoked, and that those claims have not been substantiated sufficiently for purposes of admissibility.

6.7 Regarding the author's contended violation of article 15, the Committee notes that the author, in his response to the State party's submissions, retracts this portion of the communication and is not required to consider it further (para 5.6 above).

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

B. Communication No. 787/1997, Gobin v. Mauritius (Decision adopted on 16 July 2001, seventy-second session)*

Submitted by: Mr. Vishwadeo Gobin

Alleged victim: The author

State party: Mauritius

Date of communication: 25 November 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 2001

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 25 November 1996, is Mr. Vishwadeo Gobin, a Mauritian citizen, born on 22 January 1945, who claims to be a victim of a violation by Mauritius of article 26 of the Covenant. He is represented by his son, Maneesh Gobin.

The facts as presented by the author

2.1 In September 1991, the author stood as a candidate in the general election for the legislature in Mauritius. He ranked fourth in his constituency in terms of number of votes received. According to Mauritian law, only the first three candidates from his constituency were directly elected but the author was, in principle, eligible for one of the eight additional seats which are not directly related to the constituency. However, he states that he was not given this seat because he did not belong to the "appropriate community", and another candidate from the same constituency who had received less votes than him was allocated the seat.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

Under rule 84 (1) (a) of the Committee's rules of procedure, Mr. Rajsoomer Lallah did not participate in the examination of the case.

The texts of a dissenting individual opinion, signed by Ms. Christine Chanet, Mr. Louis Henkin, Mr. Martin Scheinin, Mr. Ivan Shearer and Mr. Max Yalden, and of a separate dissenting opinion signed by Mr. Eckart Klein are appended.

2.2 The author explains that the electoral system for the legislature of Mauritius provides for 21 constituencies. In 20 of them, the three candidates with the highest number of votes are elected and in one constituency, the two candidates with the most votes are elected. Sixty-two members of the legislature are thus elected directly. The remaining eight seats are allocated to the "best losers". According to the First Schedule of the Constitution of Mauritius, all candidates have to indicate to which community (Hindu, Muslim, Sino-Mauritian or general) they belong. When appointing the eight additional members of the legislature, the Electoral Supervisory Commission applies article 5 of the First Schedule which provides that the candidates should belong to the "appropriate community". According to article 5 (8) of the First Schedule, the "appropriate community" means the community that has an unreturned candidate available and that would have the highest number of persons (as determined by the 1972 census) in relation to the number of seats in the Assembly held immediately before the allocation of the seat.

The complaint

3. The author claims that the constitutional provision of the State party according to which he had to be part of the "appropriate community" in order to be granted a seat of "best loser" is discriminatory because the criteria on which the decision is taken are based on race and religion. The said provision is thus contrary to article 26 of the International Convention on Civil and Political Rights.

Observations by the State party

4.1 In a submission dated 25 May 1998, the State party made some observations on the admissibility of the communication.

4.2 The State party first argues that the author has not exhausted domestic remedies because he did not use his right under section 17 of the Constitution to apply to the Supreme Court in a discrimination matter protected by section 16 of the State party's Constitution. In this regard, the State party also contends, with regard to the author's argument that no court of law in Mauritius can rule against the Constitution, the supreme law of the land, that the author is surmising as to the outcome of such an application and points out that he would also have had the possibility to appeal to the Judicial Committee of the Privy Council since the matter is related to the interpretation of the Constitution.

4.3 It also considers that the communication is incompatible with the provisions of the International Covenant on Civil and Political Rights. The procedure of allocation of the eight additional seats is indeed organized so as to ensure that all minorities of the country are adequately represented in the legislature and has proved to be an effective barrier against racial discrimination in the sense of article 26 of the Covenant. The purpose of the communication is thus incompatible with the provisions of the Covenant because the absence of such a constitutional provision would entail discrimination on the grounds of race, religion, national, or social origin.

4.4 Finally, the State party argues that the communication constitutes an abuse of the right of submission of such communications, because the delay between the time when the alleged discrimination took place, in 1991, and the date of the communication, 25 November 1996, is excessive and without acceptable justification. Moreover, the State party considers that the important delay removes the possibilities of an effective remedy.

Additional Comments by the author

5.1 In a submission dated 13 November 1998, the author comments on the observations by the State party.

5.2 With regard to the question of exhaustion of domestic remedies, the author first alleges that an application to the Supreme Court under section 17 of the Constitution, such as it is supported by the State party, would be aimed at challenging an action that is contrary to section 16 of the Constitution. However, in the present case, section 16 has undoubtedly not been violated; it was correctly applied. The question here is rather whether section 16 itself constitutes a violation of article 26 of the Covenant, and this is not what is provided for under section 17 of the Constitution. Secondly, the author notes that section 16 of the Constitution refers to a violation of the principle of non-discrimination by a "law", that is an Act of Parliament, and not by the Constitution itself, which means that section 16 cannot be invoked in the Supreme Court with any reasonable prospect of success. Thirdly, it is undisputable that the Supreme Court cannot take a decision that goes against the Constitution because the latter is the supreme law of the land. Moreover, because the Covenant is not incorporated in Mauritian law, the Supreme Court could only draw some guidance from the Covenant. The same is true for the Judicial Committee of the Privy Council that would apply Mauritian law and would therefore encounter the same obstacle as the Supreme Court.

5.3 It is therefore wrong to consider that the author had an available and effective domestic remedy in this particular case. The only authority entitled to change the Constitution under certain circumstances is the Mauritian Parliament and, up to now, it has not brought any change in this direction. The Committee should consequently waive in the present case the requirement of the exhaustion of domestic remedies.

5.4 In respect of the argument of the State party that the communication is incompatible with the provisions of the Covenant, the author considers that the question of election should be left to the electors and that the State should not be overprotective. Most of all, since the Mauritian population is for purpose of elections divided in four "communities" according to religion and race, the author is of the view that allocating seats on the basis of race and religion is unacceptable and fundamentally in contradiction with article 26 of the Covenant.

5.5 Finally, concerning the delay after which the communication was submitted, the author notes that a delay of five years is in many other cases a delay that is not considered to be excessive by the State party and therefore claims the same for his communication, especially where the interest of justice in international law are of such importance that they should take precedence.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The author claims that his rights under article 26 were violated by application of an arrangement enshrined in the Constitution relating to division of parliamentary seats according to ethnic affiliation. The State party has not contested that the said arrangement is enshrined in the Constitution nor that the domestic courts do not have the power to review the Constitution in order to ensure its compatibility with the Covenant. In these circumstances it is abundantly clear that legal action would have been futile and that the author had no available domestic remedy for the alleged violation of his Covenant rights. The Committee therefore dismisses the State party's claim that the communication be declared inadmissible for failure to exhaust domestic remedies.

6.3 The State party claims that because of the delay in submission of the communication the Committee should consider it as inadmissible as an abuse of the right of submission under article 3 of the Optional Protocol. The Committee notes that there are no fixed time limits for submission of communications under the Optional Protocol and that mere delay in submission does not of itself involve abuse of the rights of communication. However, in certain circumstances, the Committee expects a reasonable explanation justifying a delay. In the present case, the alleged violation took place at periodic elections held five years before the communication was submitted on behalf of the alleged victim to the Committee with no convincing explanation in justification of this delay. In the absence of such explanation the Committee is of the opinion that submitting the communication after such a time lapse should be regarded as an abuse of the right of submission, which renders the communication inadmissible under article 3 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Committee members Christine Chanet, Louis Henkin, Martin Scheinin, Ivan Shearer and Max Yalden (dissenting)

The signers of the present opinion cannot agree that the five-year period between the alleged violation and the submission of the communication is, in the absence of any convincing justification by the author, a key element in declaring the communication inadmissible under article 3 of the Optional Protocol.

The Protocol does not set any time limit for the submission of a communication.

The Committee cannot, in this way, introduce a preclusive time limit in the Optional protocol.

No particular harm was done to the State party as a result of the delay.

(Signed) Christine Chanet

(Signed) Louis Henkin

(Signed) Martin Scheinin

(Signed) Ivan Shearer

(Signed) Max Yalden

[Done in English, French and Spanish, the French text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion by Committee member Eckart Klein (dissenting)

To my regret I am not in a position to follow the majority on the issue of the abuse of the author's right to submit a communication (see para. 6.3 of the Views). I agree that the mere fact that the Optional Protocol does not fix a time limit for submission of communications does not principally exclude the application of the general rule of abuse of rights. However, in order to conclude that a right has been abused (despite the lack of any time limit) a considerable period of time must have elapsed, and the adequate length of time for submitting a communication should be assessed against the background of each individual case. In addition, it would be generally for the State party to show that the requirements for the application of the abuse of rights rule are fulfilled. In the case at hand, the State party merely argued in a very unspecific way characterizing the submission of the communication as excessive and without acceptable justification (see para. 4.4. of the Views). Likewise, the Committee is putting the burden of argument upon the author. This shift of the burden of argument would only be acceptable if the submission of the communication would be so much delayed that this delay could not be understood at all without further explanation. Taking into account that here the relevant length of time is five years only, a shift of burden of argument cannot be assumed, leaving the burden on the State party, which in this case did not argue accordingly. The mere fact that the alleged violation took place at periodic elections is not sufficient in itself. I therefore do not think that the delay in the submission of this communication can be regarded as constituting an abuse of the right of submission within the meaning of article 3 of the Optional Protocol.

(Signed) Eckart Klein

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

C. Communication No. 791/1997, Singh v. New Zealand (Decision adopted on 12 July 2001, seventy-second session)*

Submitted by:	Mr. Moti Singh
Alleged victim:	The author
State party:	New Zealand
Date of communication:	1 December 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 12 July 2001,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 1 December 1996, is Moti Singh, a New Zealand citizen, born on 13 March 1960 in Fiji, now residing in Auckland. He claims to be a victim of violations by New Zealand of articles 2, 7, 10, 14, paragraphs 1, 2, 3 (d), (e) and (g), and 5, 16, 23 and 26 of the Covenant. He is not represented by counsel.

Facts as submitted

2.1 On 22 December 1993, the author was charged with 66 charges of tax fraud under the Income Tax Act 1976. He was also charged with "theft by failing to account" under section 222 of the Crimes Act 1961.[1]

2.2 On 8 June 1995, in the Otahuhu District Court, the author was tried and convicted of 66 charges of tax fraud. The author's complaint relates to the *theft charges* proceedings only.

2.3 The author made an application for legal aid in respect of the theft charges, but was refused by the registrar of the Otahuhu District Court on 24 January 1994. On 1 February 1994, the author appealed this decision and legal aid was granted. However, the author still had to pay NZ$ 150 as a contribution.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.4 Having been convicted on the fraud charges, the author was of the opinion that he could not get a fair trial in the Otahuhu District Court, he therefore asked his counsel to seek a change of venue for the trial on theft charges. According to the author, the prosecutor objected and the venue was not changed.[2] The author was tried in the Otahuhu District Court on the theft charges, found guilty on 6 July 1995 (after a hearing lasting eight days), sentenced to nine months of periodic detention and ordered to make reparation of NZ$ 4,603.33.

2.5 On 10 August 1995, the author applied for legal aid to appeal his conviction and sentence on the grounds that the judge was biased and that he had not received a fair trial. On 4 October 1995, he was informed that his request for legal aid had been denied, because the grounds of appeal were "not substantial". The author appealed against the registrar's decision but on 31 October 1995, a judge of the Court of Appeal upheld the decision not to grant the author legal aid. Nevertheless, the author still appealed his conviction and sentence to the Court of Appeal. However, his case was dismissed on 24 July 1996.

The complaint

3.1 The author makes the following complaints.[3]

Legal aid/inadequacy of counsel at the trial hearing/trial venue

3.2 The author states that although he received legal aid, he still had to pay NZ$ 150 as a contribution to his defence. He claims that as his first lawyer had impaired vision he could not prepare his case adequately. Also, the lawyer subsequently assigned to him was not a practitioner in tax law but criminal law and, therefore, could not represent him adequately. In addition, he complains that he could not choose experienced counsel, nor could he call expert witnesses in view of the budgetary constraints. The author further complains that as his request for a change of venue was not granted, his trial was unfair.

Conduct of trial

3.3 The author states that at his trial, the judge pressured his counsel to make him plead guilty because she found the evidence against him overwhelming. Notwithstanding the alleged pressure he pleaded not guilty.

3.4 The author further argues that the judge breached her duty to guarantee a fair trial by allowing the prosecution to proceed with the six charges together in one indictment. According to the author, the fact that these charges were not severed, prejudiced his trial. He states that he could not make an application for severance because of the financial restraints under which he and his counsel were operating. Nevertheless, he states that the judge always has a discretion to sever charges in the interests of justice.

3.5 The author complains that the judge's attitude in general was biased and that she had a "profound hatred" towards him and his counsel because of their colour. The author claims that the judge hindered him in explaining his case in full, and that his counsel was prevented from effectively cross-examining the main witness for the prosecution. The author also claims that the judge's "body language" must have influenced the jury.

3.6 As further evidence of the judge's bias against him, the author refers to the sentencing notes in which the judge states, "the taxpayer was put to the expense of a two week trial on matters which in my view were totally indefensible". The author also complains that the judge told his counsel that, if the author were not to pay his NZ$ 150 contribution toward legal aid, this would be deducted from his counsel's fee.

3.7 The author states that his counsel became demoralized because of the judge's attitude and wished to withdraw at the end of the trial, but the judge refused to grant him leave to withdraw. The author argues that this deprived him of proper representation.

Prosecution

3.8 The author takes issue with the attitude of Crown counsel at the trial. He states that after he refused the prosecution's offer of plea-bargaining, Crown counsel informed counsel for the defence that he would strive to obtain convictions on all six counts. According to the author, this was calculated as "an emotional attack" on his counsel to intimidate and demoralize him. The Court of Appeal dismissed his appeal on this ground without calling his former counsel as a witness. According to the author, this constitutes a violation of article 14 (3) (e).

3.9 The author further complains about the alleged emotive and inflammatory language used by Crown counsel in his address to the jury. He claims that the way Crown counsel cross-examined him was highly prejudicial to his case; as he was compelled to answer self-incriminating questions and was insulted by him. Finally, he complains that the prosecutor tried to influence the judge with regard to the sentencing.

3.10 The author further alleges that an agreement between Crown counsel and the defence was breached by the Crown. According to the agreement, the Crown would only refer to the six counts of theft and not make reference to the 66 summary convictions on tax fraud. When the Crown counsel began to introduce precluded evidence, the author's counsel objected stating that such matters were inadmissible as they were in breach of the agreement. His objection was overruled by the judge. The author states that this was prejudicial to his defence. On appeal, the Court of Appeal found no merit in the author's complaint, since the agreement was sufficiently broad to allow the matters put by the Crown.

Hearing of witnesses

3.11 The author states that he could not call a certain Mr. Kumar as defence witness, because the individual concerned had been removed from New Zealand on 8 May 1993. He claims that this witness could have contradicted evidence given by prosecution witnesses and would have created serious doubts about the credibility of the testimony given by the main prosecution witness. On appeal, he filed an affidavit which the Court of Appeal considered did not constitute a basis to overturn the author's convictions.

3.12 He further contends that the main prosecution witness, lied in Court, and implies that the State's law enforcement and prosecuting agencies regularly resort to producing false evidence in order to secure convictions.

3.13 He alleges that a second witness for the prosecution, a Mr. Chandra, lied in court when he denied that the author assisted him in immigration matters and that counsel was not allowed to put copies of letters relating to the immigration matters to the witness. According to the author, these documents would have raised doubts as to the credibility of the witness, and the judge's ruling thus violated his right to an effective defence.

3.14 The author further argues that the evidence of one witness, who died before the beginning of the trial, should not have been allowed. He explains that the witness was dying of AIDS when his statement was taken from him. He argues that the witness was not fit to give a statement, since one day earlier he had not been fit to attend an interview. He further contests that the statement was voluntary. However, after a voire dire the judge allowed the statement.

Summing-up and sentencing

3.15 The author claims that the summing-up by the judge to the jury was unfair and favoured the prosecution's case.

3.16 As to the sentencing, the author complains that the judge made all sorts of disparaging remarks, and in particular he complains that she recommended the Crown to send a copy of her sentencing remarks to the New Zealand Society of Accountants and the Divisional Director of the National Institute of Accountants, in order to prevent him from continuing practicing as an accountant. The author, explaining that his disabled mother is dependent on him, claims that this constitutes a violation of article 23 (1) of the Covenant. The author further complains that the sentence was excessive and that he is unable to pay the reparation ordered. He claims that compared to similar cases, his sentence was most severe and again argues that this was because he is black. In this context, he also complains that white defendants are able to hire experienced counsel, whereas black offenders have to accept legal aid representation thereby limiting their chances of acquittal or of a mild sentence. This is said to amount to a denial of justice.

3.17 The author claims that the judge's bias against him was grounded in her prejudice against black defendants in general. He refers to several decisions made by the judge purportedly showing her prejudice. In this context, he mentions that his defence counsel (who was also black) told him to engage a white lawyer for the submissions on sentencing in order to escape prison. The author further states that the Otahuhu District Court is well known for "its ease in securing convictions". The author also complains about the quality of the judiciary in New Zealand in general.

Appeal

3.18 The author maintains that the refusal of legal aid to conduct his appeal violated the interests of justice and discriminated against him on the basis of race, colour and other status. The author challenges the correctness of the decisions rendered by Court of Appeal judges, since more than 52 per cent of their decisions have been overturned by the Privy Council in the past, and claims that a judge's estimation that the grounds for appeal are not substantial is thus not necessarily correct. He further claims that by refusing him legal aid on the grounds that the appeal had no merit, the Court showed prejudice against him, in violation of article 26. He also argues that as he had received legal aid for his District Court hearing he had a "legitimate expectation" that he would be accorded it for his appeal. Referring to the discretion the registrar has in allowing/declining legal aid, the author states that the system is open to abuse with black minorities like himself always being refused legal aid. Moreover, he alleges that the registrar's refusal to grant him legal aid was mala fide because inter alia, he was "predetermined" to refuse it, he gave the author very little time to file his documents and used a malicious "tone" in his correspondence with him. He also claims that his review application was not examined properly as it was decided within two working days.

3.19 The author further complains that the judge at the Court of Appeal was biased against him and interrupted him rudely when he made a mistake thereby affecting his mental ability to argue his appeal. He states that the appeal was a farcical exercise and that the outcome was predetermined, as shown also by the refusal to grant him legal aid. Moreover, one of the appeal judges had previously sat in his appeal on the tax fraud charges[4] and, according to the author, should have disclosed his prior involvement in the author's case and stepped down as judge at the Court of Appeal hearing. The author explains that he did not bring this issue up during the appeal as he was afraid to be found in contempt of court. He further states that this judge is "notorious for making ill-considered remarks during sentencing of offenders who are either immigrants or aboriginal Maori people". In general, the author complains that the judiciary is predominantly white to the detriment of black defendants.

Miscellaneous

3.20 The author explains that he is serving his sentence by reporting to a detention centre every Saturday where he is then detained for eight hours and forced to do manual labour regardless of weather conditions. This is said to amount to a violation of articles 7 and 10 of the Covenant. In this context, he submits that there is only a portable "pit" toilet at the work site for 8 to 10 detainees and that no soap or detergent is provided. Further, he complains that the food served is insufficient, of bad quality and prepared under unhygienic conditions. He states that he is only given a cup of tea mid-morning and a cheese and pork sandwich for lunch. He further complains that despite the heavy manual labour, no safety gear or protective clothing is provided and that detainees have to buy their own safety shoes. He further claims that he has contracted a severe skin infection on his hands from wearing gloves, provided by the prison, but which were used by other detainees before and not disinfected.

3.21 He further claims that his mother is a victim of a violation of article 7 of the Covenant, since the State party's acts have caused her anguish and suffering and since he is not able to care for her during the eight hours he spends in detention each week.

Observations by the State party on admissibility and the merits

4.1 The State party submits that all the author's allegations are inadmissible on the basis of either incompatibility with the Covenant, failure to substantiate, or non-exhaustion of domestic remedies. In the event that the Committee consider any of the allegations admissible the State party contends that they fail for reasons of non-substantiation on the merits.

4.2 On a general basis the State party notes that most of the allegations relate to matters pertaining to the District Court trial which have already been dealt with and dismissed by the Court of Appeal. The State party refers to the Committee's jurisprudence that it is for the appellate courts of States parties and not the Committee to evaluate the facts and evidence of a particular case unless the proceedings are found to be manifestly arbitrary or to constitute a denial of justice. Accordingly, most of the matters raised in this communication are outside the scope of the Committee.

Legal aid/inadequacy of counsel at the trial hearing/trial venue

4.3 The State party contends that the author had effective representation. It states that the author's suggestion that the registrar deliberately assigned the author a blind lawyer is untrue and that all legal aid lawyers are assigned on a rotation basis from a roster. It states that a contribution towards legal aid is not an infrequent practice and that the amount would not have caused the author any hardship. In addition, it states that the author could have sought a review of the registrar's decision on the contribution but as he failed to do so domestic remedies in this regard have not been exhausted.

4.4 On the issue of the trial venue, the State party contends that the author has not exhausted domestic remedies as he failed to apply to the District Court judge under section 28 (d) of the District Courts Act 1947 and section 322 (1) of the Crimes Act 1961 for a change of venue.

Conduct of trial

4.5 With respect to the author's allegations on the conduct of the trial, the State party contends that all these issues, including the alleged bias of the trial judge, the alleged impropriety of the trial judge in raising the possibility of a guilty plea, and the reference by the judge that legal aid funds were being used unnecessarily, were dealt with in full by the Court of Appeal and that the author has failed to substantiate his claim. In this regard the State party highlights some of the reasons given by the Court of Appeal in coming to its decision.[5] In addition, on the issue of the judge's refusal to allow counsel to withdraw, the State party points to the judgement of the Court of Appeal stating that it was appropriate for the trial judge to seek to dissuade counsel from withdrawing at such a late stage in the trial (several days hearing into the trial) and that there is nothing in the record indicating counsel's application for leave.

Prosecution

4.6 On the issue of the prosecution's conduct, the State party contends that the majority of these issues were examined by the Court of Appeal and again quotes from the judgement.[6]

4.7 In relation to the alleged violation of article 14, paragraph 3 (c) by the courts, failure to allow the author to call his former counsel to give evidence, the State party contends that the author has not exhausted domestic remedies. Apparently, a letter was sent from the deputy registrar to the author, dated 10 July 1996, setting out the procedure the court should follow in arranging the examination of the author's counsel. The author did not follow-up on this letter. If he did not actually receive this letter, he should have attempted to follow it up with a telephone call.

4.8 Similarly, the State party claims that the author failed to exhaust domestic remedies in relation to the court's refusal to sever the charges on the indictment. As the author himself admitted, it was open to him to apply to the Court to do so. The State party contends that on the issue of the prosecution's alleged breach of the agreement between it and the defence, the State party argues that this issue was dealt with in full by the Court of Appeal and dismissed.[7]

Hearing of witnesses

4.9 On the matter of the hearing of witnesses the State party contends that these issues, in their entirety, were dealt with not only by the trial judge but also by the Court of Appeal and refers to the latter's judgement in this respect.[8] In relation to the allegation that one of the witnesses lied during the trial, the State party adds that the author failed to put this matter to the Court of Appeal and therefore has not exhausted domestic remedies in this regard.

Summing-up and sentencing

4.10 The State party contests the author's allegations on the issue of the judge's summing-up. On the issue of sentencing and the judge's invitation to the prosecution to inform the New Zealand Society of Accountants of the conviction, the State party claims that this is not an infrequent practice. It was, in the State party's view a prudent and reasonable course of action as it was reasonably apparent on the facts of the case that the author may attempt to act in the same way again.

4.11 On the issue of racial discrimination, the State party notes that the author did not raise this issue at any time at the Court of Appeal and therefore has not exhausted domestic remedies nor has he substantiated this claim. In addition, it is argued that the alleged excessive nature of the sentencing was brought before the Court of Appeal and dismissed.

Appeal

4.12 On the question of refusal of legal aid for the appeal the State party contests all the allegations made by the author. In particular, and in relation to the author's claim that the decision was unjust, it describes the procedure in detail whereby the author's application was examined by the registrar and subsequently independently examined by four judges of the Court of Appeal. On the issue of the registrar's alleged male fide, the State party claims that the author has failed to substantiate this allegation. In addition, the author's submission on this issue was dismissed by the Court of Appeal which noted "the grounds of appeal put forward were not enough to justify it, and that it had been considered by three judges of the Court of Appeal" when the appeal was considered on the merits.

4.13 The State party argues that it fulfilled its obligations under article 14, paragraph 3 (d) of the Covenant in light of the following:

(a) That assessments were made independently by four judges of the Court of Appeal and that the interests of justice did not require that legal aid be accorded to the author for his appeal;

(b) That those preliminary assessments indicated that the grounds for appeal were not substantial;

(c) That the District Court sentence being appealed against was not in the upper category of severity: no sentence of incarceration was imposed (but only a moderate term of periodic detention), and although the author was ordered to make reparation of a sum of misappropriated moneys, no monetary fine additional thereto was levied;

(d) That the author was competent enough to prepare and argue his case on appeal to the extent that in its judgement the Court of Appeal commended his "careful, thorough and helpful written submissions and the responsibly made oral submissions to supplement them".

4.14 Furthermore, the State party argues that the author was not without means to pursue his appeal, that he privately engaged a lawyer to act for him and that the lawyer was under instructions from him from 24 October 1995 until mid-June 1996, i.e. for most of the period between the initial lodging of his appeal in mid-August 1995 and the hearing of his appeal on 23 July 1996.

4.15 On the author's argument that one of the judges who had previously been involved in the appeal on tax fraud charges should not subsequently have been involved in the legal aid decision, the State party submits that there are only a small number of Court of Appeal judges and that therefore the situation is not always avoidable. If a judge were to make a decision based on such reasoning, it would be contrary to his judicial oath. In addition, the State party argues that the author could have challenged the participation of the judge in question at the outset of the hearing. It is difficult, according to the State party, to accept the view that the author feared that he would be held in contempt of court since no such issue would have arisen. Thus, the author has failed to exhaust domestic remedies in this regard.

4.16 In response to the author's allegation that the decision was "pre-determined", the State party refers to the fact that several hours were devoted to this case and that the 20-page judgement of the Court of Appeal is very detailed and comprehensive.

Miscellaneous

4.17 On the issue of the conditions of detention, the State party explains in great detail the regime in place. As the island on which the detention takes place is a reserve, it is not possible to maintain a permanent toilet installation and a different type of facility had to be adopted. This toilet, which has met the requirements of the City Council, is fully enclosed, has proper seating, and lime is use in the "pit" to dispense with unpleasant odours. This is common practice with this type of toilet.

4.18 The State party contests that no soap or detergent is provided for and states that, in addition, each individual receives a towel. All these supplies are checked weekly and replenished when required. The detainee responsible for the preparation of food is issued with a pair of "food processing gloves" which he must wear at all times when handling food. This is closely monitored by a Work Party Supervisor. The State party describes in detail the rations of food provided to each detainee and contests that it is insufficient. It also states that the author never asked to receive special food in line with any religious or ethnic factors, yet he could have done so.

4.19 The State party contests that all tasks involve heavy labour. As to safety, all work sites are inspected by the Probation Officer before any work party is sent out to the site. During this inspection, health and safety guidelines are used in the inspection process. Where it is clear that protective equipment/clothing is necessary, this equipment is supplied to the Work Party Supervisor. Not all sites require protective clothing. The State party contests that detainees are expected to purchase protective clothing but states that it is supplied by the Period Detention Centre. It also states that footwear is provided to those who cannot afford to purchase their own and detainees may also use their own gloves if they wish. The State party also remarks that at no stage did the author inform or produce a medical certificate to any of the Centre staff regarding a skin infection. Nor did any of the staff receive verbal or written complaints from the author regarding these matters.

4.20 On the allegation of a violation of articles 7, 10 and 23 in relation to the author's mother, the State party contends that such a complaint could be lodged personally by his mother. However, on the merits, it states that the author attends the Centre only 8-10 hours each week and that both the author and his mother receive benefits from the State in relation to her illness.

The author's reply to the State party's submission

5.1 In his response, the author reiterates the arguments made in his initial communication. To the State party's argument that it is not for the Committee to evaluate facts and evidence, the author argues that the jurisprudence of the Committee can and should be revised and that, in any event, the proceedings were arbitrary and manifestly unfair. In this context, the author claims that the decision of the Court of Appeal was "subjective" and provides no legal authority to support its findings. He reiterates the fact that he was not represented and was no match for the Crown counsel.

5.2 To the State party's argument that he had not exhausted domestic remedies in respect of several of the violations, the author responds that this was his counsel's responsibility and he should not be penalized for his counsel's error. Furthermore, and in response to the same argument by the State party on issues relating to his appeal, the author argued that he could not be expected to be aware of possible domestic remedies as he had no legal representation.

5.3 The author contests the State party's explanation on the system of assigning legal aid counsel from a roster.[9] On the issue of the change of venue, he argues that this is at the discretion of the judge and that the remedy "is not available and would not have been effective".

5.4 The author states that only three hours were devoted to his appeal and that this was insufficient time to demonstrate that he had received a fair hearing. He claims to have substantiated his allegations of discrimination in his reference to four different cases in which the same trial judge presided and which he alleges demonstrate her prejudice. He states that the domestic remedy alleged by the State party to have been open to the author was neither available, effective nor sufficient.

5.5 The author reiterates his claim in relation to the summing-up and sentencing and provides information on domestic cases, which he claims were similar to his and in which the individuals concerned received lighter sentences. On the issue of the judge's decision to bring the author's conviction to the attention of his professional body, the author states that the State party has not provided any examples of instances when this was done before and therefore failed to substantiate their argument.

5.6 The author rebuts the State party's explanation on the refusal of legal aid and claims that it has not provided any evidence to demonstrate that his application was examined by four judges of the Court of Appeal. The author claims that the reason he was refused legal aid was on the basis of the costs of such an appeal. The consideration of the costs of the appeal as a precondition to granting it is, in the author's view, "illegal" and a clear violation of article 14, paragraph 3 (d) and 14, paragraph 5.

5.7 The author contests the State party's explanation on the conditions of detention. He says that he and other detainees had complained on many occasions about the insufficient amounts of food provided but that nothing was done. He says that he told the wardens verbally and several times in writing about his cultural beliefs and that he could not eat beef. However, he continued to be provided with it in his meals.[10] He also claims to have told the wardens about his skin infection and to have supplied them with medical certificates.[11] In addition, he claims to have received punishment for minor things like talking to other detainees and was "hooded, forced to remain standing for 10 hours, and subjected to verbal abuse having racial connotations".[12]

5.8 The author confirms that he is receiving social security but that he only began to receive it after he lost his part-time job upon conviction. This does not, he claims, allow the State party to avoid its responsibility to protect the family.

Issues and proceedings before the Committee

6.1 Before considering any claims in the communication, the Human Rights Committee must, according to article 87 of the rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 On the issue of the contribution the author had to pay towards the cost of legal representation for the District Court trial hearing, the Committee notes that the author did not seek a review of the registrar's decision in this regard and therefore considers that the author has failed to exhaust domestic remedies. Thus, this claim is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

6.3 Similarly, on the issue of the trial venue, the Committee notes that, the author failed to apply to the District Court judge for a change of venue and therefore has failed to exhaust domestic remedies. Thus, this claim is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

6.4 In relation to the alleged violation of article 14, paragraph 3 (c) for failure to allow the author to call his former counsel as a witness at the Court of Appeal hearing, the Committee notes that the author did not follow the required procedure to allow his counsel to give evidence and therefore failed to exhaust domestic remedies. Thus, this claim is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

6.5 On the issue of the court's refusal to sever the charges on the indictment, the author himself admitted that he failed to apply to the court to do so and therefore has not exhausted domestic remedies. Thus, this claim is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

6.6 With respect to the allegation that one of the witnesses lied during the trial, the Committee notes that the author did not put this matter to the Court of Appeal and therefore has failed to exhaust domestic remedies. Thus, this claim is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

6.7 On the issue of the alleged violation of article 26 of the Covenant, on the basis of the author's skin colour, the Committee notes that the author did not raise this issue at any time before the Court of Appeal and therefore has not exhausted domestic remedies. This claim is therefore inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

6.8 On the issue of the participation of a judge at the Court of Appeal who had previously been involved in the appeal on tax fraud charges, the Committee notes that the author did not challenge the participation of the judge during the hearing. This claim is therefore inadmissible for failure to exhaust domestic remedies under article 5, paragraph 2 (b) of the Optional Protocol.

6.9 With regard to the allegation that the representation the author received during the District Court trial was not effective and thus not in accordance with article 14, paragraph 3 (d), the Committee considers that the mere fact that the author's first lawyer was visually impaired and his second lawyer not a practising tax lawyer is not sufficient to demonstrate that they were ineffective within the terms of the Covenant. The Committee considers, therefore, that the author has not provided sufficient information to substantiate this claim for the purposes of admissibility. This claim is therefore inadmissible under article 2 of the Optional Protocol.

6.10 In respect of the claim that the refusal to grant the author legal aid for his appeal constituted a violation of article 14, paragraph 3 (d) and paragraph 5, of the Covenant, the Committee notes that the author's request was examined by the registrar and subsequently by four judges of the Court of Appeal who concluded that the interests of justice did not require the assignment of legal aid. The Committee is of the view that the author has not sufficiently substantiated his allegation to the contrary, for purposes of admissibility, and this claim is inadmissible under article 2 of the Optional Protocol.

6.11 The Committee notes that the author's remaining claims under article 14 of the Covenant essentially relate to the evaluation of facts and evidence as well as to the implementation of domestic law. The Committee recalls that it is in general for the courts of State parties, and not for the Committee, to evaluate the facts in a particular case and to interpret domestic legislation.

The information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts and their interpretation of the law were manifestly arbitrary or amounted to a denial of justice. These claims are therefore inadmissible under articles 2 and 3 of the Optional Protocol.

6.12 In relation to the alleged violations of articles 7 and 10 suffered by the author's mother as a result of the author's detention, the Committee observes that under article 2 of the Optional Protocol, it is the alleged victim himself or herself who has standing to submit a communication to the Committee. Further, even disregarding the fact that the author's mother has not submitted a communication, the Committee considers that the author has failed to substantiate these claims for the purposes of admissibility. This claim is therefore inadmissible under article 2 of the Optional Protocol.

6.13 With respect to the alleged violations of articles 7 and 10 of the Covenant suffered by the author as a result of the conditions during his eight-hour weekly work programme, the Committee is of the view that the allegations raised are not sufficient to establish a claim under article 7 or 10 of the Covenant. The same is true of the additional claims referred to in paragraph 5.7 which were subsequently brought forward by the author. These claims are therefore inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That this communication is inadmissible under articles 2, 3, and 5, paragraph 2 (b) of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] It appears that the author was accused of filing false tax returns in the name of his clients, most of them friends and relatives, and of subsequently keeping the refunds paid by the Inland Revenue in a bank account in his name and in the name of another relative. The author states that the money was deposited there in order to help this relative with immigration matters. Moreover, he states that he also did immigration work for many of his clients and that he deducted the fee from the tax refunds.

[2] There is no trace of any request for change of venue, nor of Prosecution's objection, in the documents submitted by the author.

[3] In his initial submission the author did not always relate the alleged violations to any particular articles of the Covenant. In his response to the State party's submission he acknowledges this and claims that his communication relates to allegations of articles 2, 7, 10, 14, 23, and 26.

[4] His appeal in this regard was dismissed.

[5] For example, "We do not consider there is any substance in these submissions. It is not unusual for a judge to raise the possibility of a guilty plea. Any comment about the use of legal aid funds does not necessarily indicate bias. Nor does any order relating to the appellant's contribution, apparently intended to ensure that his contribution was met and he made this up to his counsel."

[6] In the decision of the Court of Appeal the following remark was made, "The appellant submitted that counsel for the Crown acted improperly in a number of respects. … The appellant claims that he was told by Mr. Chand that when counsel for the Crown offered to drop the charges in respect of counts 2 and 5 if the appellant pleaded guilty to the remaining and the appellant refused, Crown counsel said that he would 'strive for a conviction'. Quite apart from this being hearsay evidence, such a statement made between counsel could hardly amount to misconduct."

[7] The State party quotes from the Court of Appeal decision as follows: "… We do not accept this submission. Under the agreement the Crown was entitled to lead the witnesses any 'evidence that relates to returns which relate only to the counts in the indictment'. So as long as the evidence related to the returns, it was within the agreement. The evidence to which the appellant now objects is in that category."

[8] One of its remarks was as follows "… However, there must be significant doubt about Mr. Kumar's credibility. Had he been available to give evidence he would have faced cross-examination on the statement that he gave Mr. Hudson. He would have been forced to admit that he lied to Mr. Hudson. Even allowing for his explanation for these lies, that must throw considerable doubt on the credibility of the evidence contained in his affidavit. Even if some credibility is to be given to it, it would not, in our view, be sufficient to justify setting his conviction on count 2 relating to Mr. Puni, still less in respect of the other counts."

[9] The author provides an affidavit from Mr. Sharma (his former lawyer) on this issue.

[10] The author provides copies of these letters of complaint.

[11] No written documentation is provided in this regard.

[12] This allegation was not mentioned in his initial communication and the author provides no further information on this point in the subsequent submission.

D. Communication No. 808/1998, Rogl v. Germany, (Decision adopted on 25 October 2000, seventieth session)*

Submitted by:	Mr. Georg Rogl (represented by Mr. Georg Rixe)
Alleged victim:	The author
State party:	Germany
Date of communication:	29 October 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2000,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr Georg Rogl, a German national, born 30 May 1950. He presents the communication on his own behalf and on behalf of his daughter Nicole, also a German national, born 7 April 1985. He is represented by legal counsel, Mr. Georg Rixe. He claims that he and his daughter are victims of violations by the State party of article 14, paragraph 1, article 17, paragraphs 1 and 2, article 23, paragraphs 1 and 4, and article 24, paragraphs 1 and 2.

1.2 The International Covenant on Civil and Political Rights entered into force for the State party on 17 March 1974, and the Optional Protocol on 25 November 1993. Upon acceding to the Optional Protocol, the State party entered a reservation to the Optional Protocol which reads: "The Federal Republic of Germany formulates a reservation concerning article 5, paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications (a) which have already been considered under another procedure of international investigation or settlement, or (b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany, or (c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. Under rule 85 of the Committee's rules of procedure, Mr. Eckart Klein did not participate in the examination of the case.

The facts as presented

2.1 Following the breakup of the author's marriage, his former wife remarried on 15 December 1989. She had previously received custody of the daughter out of her marriage to the author, who is the centre of the present communication. The author's former wife, by way of application of 16 September 1991 to the Cham Municipal District Administration, applied for the daughter's surname to be changed from the author's surname to the new surname of the author's former wife. This application was granted on 9 March 1992.

2.2 The author's administrative appeal to the Upper Palatinate District Government was rejected on 23 July 1992. The Regensburg Administrative Court, the Bavarian Administrative Court of Appeal, and the Federal Administrative Court rejected further appeals by the author on 7 December 1992, 30 November 1992 and 27 June 1994. The author's subsequent constitutional motion to the Federal Constitutional Court was rejected on 9 December 1994 as inadmissible.

2.3 Following the exhaustion of domestic legal proceedings, the author introduced on 26 May 1995 an application concerning the same facts and issues to the European Commission of Human Rights. On 25 August 1995, the application was registered under file No. 28319/95. The European Commission, by majority plenary decision of 20 May 1996, held the application "manifestly ill-founded" and accordingly inadmissible.

2.4 The present communication was transmitted to the State party on 26 February 1998. The State party's observations concerning the admissibility of the communication were received on 24 April 1998, and counsel's comments thereon on 3 August 1998. Counsel supplied supplementary comment on 7 June 2000, upon which the State party commented on 26 September 2000.

The complaint

3. The author alleges that the official change of his daughter's surname from his own surname to the new surname of his former wife, the confirmation of the name change by each instance of the State party's courts and a variety of alleged procedural defects in those proceedings (including the failure in one instance for a judgement to be publicly pronounced) constitute a violation of both the author's and the daughter's rights under article 14, paragraph 1, article 17, paragraphs 1 and 2, article 23, paragraphs 1 and 4, and article 24, paragraphs 1 and 2.

Counsel's information and observations with regard to the admissibility of the communication

4.1 The author's original submission, in addition to an extensive rehearsal of facts and argument on merits, makes a variety of arguments on the admissibility of the case. The author contends firstly that the communication is not excluded by paragraph (a) of the State party's reservation to article 5, paragraph 2 (a) of the Optional Protocol, lodged upon accession, which precludes the Committee's competence to consider a communication that has already been considered by another procedure of international investigation or settlement.

4.2 The author presents two arguments with respect to this reservation. He invokes the Committee's decision in Casanovas v. France,[1] where a case held inadmissible ratione materiae by the European Commission was not found to have been "considered", so as to preclude consideration by the Committee by virtue of a very similar reservation lodged by that State party. In terms of the claim brought on behalf of the child, the author argues that, since the author's preliminary standing to bring a claim on behalf of the child was denied by the European Commission, there can be no contention that any consideration of that aspect of the claim occurred. Nor can any consideration of the father's case preclude, by virtue of the reservation, separate consideration of the daughter's case, for the various persons make different claims.

4.3 The author's second argument is that the Committee is not precluded from considering the communication by paragraph (b) of the State party's reservation. The author contends that it was only with the receipt of the decision of the Federal Administrative Court on 8 July 1994 that the ordinary legal proceedings were concluded and that the change of name received legal effect. At this point, the Optional Protocol was in force for the State party. Moreover, the decision of the Federal Constitutional Court of 9 December 1994 declining a constitutional challenge constituted a renewed violation.

4.4 Secondly, the author contends in any event that the doctrine of "continuing effects", by which violations of the Covenant dating before entry into force of the Protocol may be considered by the Committee if there are continuing effects felt by the alleged victims, is applicable in this case. The bond between father and daughter is weakened on an ongoing basis for as long as the name change remains in effect. The author cites to that effect the Committee's views in E. and A.K. v. Hungary[2] and Simunek v. Czechoslovakia,[3] supported by the Committee's General Comment No 24 of 11 November 1994. The author contends that to interpret the State party's reservation to exclude violations with continuing effects would be contrary to the spirit and purpose of the Optional Protocol.

4.5 Thirdly, the author contends that the communication on the name and on behalf of the daughter is not inadmissible ratione personae simply because the father is not a custodial parent. The author cites the Committee's Views in P.S. v. Denmark[4] in support of the proposition that non-custodial parents may bring a communication on behalf of a their child. The author argues that it is clear that the daughter herself is not able to bring a communication, while the mother's own separate interests clearly do not incline her to do so. The relationship of father and daughter is therefore claimed to be sufficient to found his standing to bring the communication on his daughter's behalf.

The State party's information and observations with regard to the admissibility of the communication

5.1 The State party's first argument on admissibility is that the Committee is precluded from examining the communication under paragraph (a) of its reservation. The State party argues that a "consideration" within the meaning of the State party's reservation occurred when on 20 May 1996 the European Commission of Human Rights declared the author's application of 26 May 1995 inadmissible. The State party argues that it is incorrect to characterize the dismissal of the application as a finding of inadmissibility ratione materiae. In contrast to the

Casanovas case, where the Commission reached such a finding on the basis that the rights recognized by the European Convention simply did not extend to the facts in question, the Commission in the instant case proceeded from the assumption that the provisions of the European Convention that the author felt had been violated were applicable.

5.2 In terms of article 8 of the Convention, which broadly corresponds to article 17 of the Covenant, the Commission proceeded not only from an assumption of applicability, but also of interference with that right, before finding the interference justified. The State party argues that the provisions of the European Convention the author claims were violated are for the greater part identical with the provisions of the Covenant now invoked. The Commission carried out a complete, thorough and comprehensive examination of the entire circumstances of the case before reaching a finding that the complaint was manifestly ill-founded.

5.3 The State party observes that a significant reason for this part of the State party's reservation is to avoid duplication of procedures of international review, which could give rise to conflicting results. It is also in the interests of the ability of international human rights organs to function effectively to avoid applicants engaging in "forum shopping". This is particularly the case where extensive consideration of the factual situation had already taken place under an international procedure, as in the present case.

5.4 This approach of seeking to avoid the repeated involvement of different international human rights organs with identical applications is not a particularly restrictive one taken by the State party, but one which is said to be becoming standard in international agreements. The State party cites very similar provisions to this effect in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in the (then) draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.

5.5 On counsel's arguments as to inadmissibility ratione temporis, the State party contends that the decisive event is the advice of 9 March 1992 of the Cham Municipal District Administration of the change of name, and the subsequent confirmation of 23 July 1992 by the Upper Palatinate District Government. Both these dates fall prior to entry into force of the Optional Protocol for the State party. The State party notes that its administrative law makes the last administrative act, i.e. the 23 July 1992 advice, the subject of judicial review proceedings.

5.6 This falls within both the wording and intention of the State party's reservation, which excludes violations having their "origin in events" prior to entry into force of the Optional Protocol, in addition to violations occurring prior to that entry into force. The State party cites the Committee's views in K. and C.V. v. Germany[5] as consistent with that approach.

5.7 The State party further regards the communication inadmissible as it regards the daughter for two reasons. Firstly, it is said to be inadmissible ratione personae, as held by the European Commission, as a non-custodial parent lacks authority to bring these proceedings. The State party considers that it does not appear that the Committee applies different criteria than the Commission in this respect. It is argued that recognizing standing in this case would be disregarding the will of the custodial parent. The State party also considers that domestic remedies have not been exhausted as the State party's courts had at no point been seized of the question of a violation of the daughter's, as opposed to the father's, rights. For this to have occurred, the daughter herself would have to have brought proceedings, which for obvious reasons did not occur.

Counsel's response to the State party's information and observations with regard to the admissibility of the communication

6.1 The author, by his submission of 3 August 1998, rejects the State party's views on admissibility.

6.2 As to the contention that the communication has already been considered by another mechanism, the author argues for a restrictive interpretation of the reservation, noting that the European Commission's decision was solely on admissibility and not on the merits. Arguing from a general observation by the Committee in Casanovas that the European Convention's rights "differ in substance" from those set forth in the Covenant, the author rejects the State party's characterization of the two sets of rights invoked in this case as being "for the greater part identical". He observes that the articles 23 and 24 pleaded have no equivalent guarantees in the European Convention. In terms of article 17, he contends that the equivalent article 8 in the European Convention is more restrictively phrased. Moreover, regarding the alleged violation of article 14 (1) through the lack of public pronouncement of an appellate decision, it could not be said that any "consideration" of that aspect has occurred as the Commission found local remedies had not been exhausted.

6.3 In terms of the State party's argument of inadmissibility ratione temporis, the author repeats the contention that the date of violation in question is the legal finality of the name change in the form of service on 8 July 1994 of the Federal Administrative Court's order of 27 June 1994 declining leave to appeal, and is therefore not excluded ratione temporis by the second part of the State party's reservation. It was only at this point that the change of name took actual effect.

6.4 In any event, the decision of the Federal Administrative Court and then the Federal Constitutional Court were further violations of the Covenant in that they confirmed the original violation. The author also views these confirmations of the original alleged violation as providing a continuing effect over which the Committee has competence. The name change itself also has continuing and future effects for father and daughter. The author states that these continuing effects are not contested by the State party. The author also argues that this portion of the State party's reservation is incompatible with the object and purpose of the Optional Protocol.

6.5 Finally, the author argues that he does have standing to bring the communication on behalf of the daughter, citing the Committee's views in P.S. v. Denmark[6] and Santacana v. Spain[7] in support. At least to this extent, the Committee takes a broader approach than the European Commission. As to the exhaustion of domestic remedies, the author states that the domestic courts did consider the rights and interests of the daughter, and that the daughter was legally party to the court proceedings via her mother. It is not necessary for the daughter herself to have brought proceedings.

Further information and observations with regard to the question of admissibility

7. By further submission of 7 June 2000, the author makes a further submission on the arguments of inadmissibility ratione temporis. He argues that according to domestic law the key time point is the oral proceeding before the last appellate court, where the authorities have made the effectiveness of their decision conditional upon it being no longer legally contestable. The State party observes by submission of 26 September 2000 that there is no suggestion in the present case that the original decision was made conditional in any such respect, and that accordingly the general administrative law rule originally outlined by the State party, i.e. that the original administrative decision was the key time point, remains applicable.

The author's arguments with respect to the merits

8.1 The author makes detailed submissions on the alleged breaches of his rights under articles 14, 17 and 23, which, for the reasons as to admissibility developed below, it is not necessary to set out further. In terms of the alleged violations of the daughter's rights, the author states, in terms of articles 17 and 23, that the change of name has disrupted her family life, interfered with the bond with her father, and has not been shown to be necessary and in the best interests of the child.

8.2 In terms of the daughter's rights under articles 14 and 24, the author states that at no time in the proceedings was the daughter heard by the Courts in a matter which clearly affected her, nor was independent legal representation provided to her in circumstances where her mother, as legal guardian, had her own independent and distinct interests in the matter. The daughter's rights to a fair trial and special protection as a child are therefore alleged to be violated by these procedural lacunae in the proceedings. In this connection the author refers to the Committee's Views in Gallicchio v. Argentina,[8] which found a breach of article 24 in insufficient representation of a child in the relevant court proceedings.

Issues and proceedings before the Committee

9.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 Concerning the author's allegations of violations of his own rights under articles 14, 17 and 23, the Committee notes that the European Commission of Human Rights has rejected, on 20 May 1996, the author's application concerning the same facts and issues as are before the Committee. The Committee also recalls that the State party, when acceding to the Optional Protocol, made a reservation with respect to article 5, paragraph 2 (a), of the Optional Protocol to the effect that the Committee shall not have competence to consider communications which have already been considered under another procedure of international investigation or settlement.

9.3 The Committee notes that the European Commission proceeded on the assumption that the provisions of the European Convention that the author felt had been violated were applicable, and carried out a complete examination of the facts and issues arising in the case. The Commission, having considered the entire circumstances of the case thoroughly and comprehensively, ultimately found that the interference with the author's right to family life was justified and consequently declared his claim inadmissible as manifestly ill-founded. In terms of the claims of unfairness of the proceedings, the Commission found that, with the exception of an alleged violation through the failure of the Bavarian Administrative Court of Appeal to pronounce its decision publicly, there was no reason to conclude that the proceedings were unfair when viewed as a whole.

9.4 In terms of the author's argument that the provisions of the European Convention are different from the provisions of the Covenant now invoked, the mere fact that the wording of the provisions vary is not enough, of itself, to conclude that an issue now raised under a Covenant right has not been "considered" by the European Commission. A material difference in the applicable provisions in the instant case must be demonstrated. In this case, the provisions of articles 6, 8 and 14 of the European Convention, as interpreted by the European Commission, are sufficiently proximate to the provisions of articles 14 and 17 of the Covenant now invoked that the relevant issues arising can be said to have been "considered". That conclusion is not altered by the additional pleading before the Committee of article 23 of the Covenant, as any issues arising under that article have in their substance been addressed in the foregoing consideration by the European Commission.

9.5 Thus the present communication is to be distinguished from Casanovas v. France,[9] upon which the author places considerable reliance, by reason of the fact that in that case the European Commission did not consider the provisions of the European Convention even to extend in their application to the facts of that case. It follows that the instant communication has been "considered" by another international mechanism as far as the author's rights to family and the right to a fair trial (excepting the allegation on the pronouncement of judgement) have been concerned. Paragraph (a) of the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol is therefore applicable, and the Committee is precluded from examining these aspects of the communication.

9.6 Regarding the author's allegation of a violation of article 14 (1) by a failure of the Bavarian Administrative Court to publicly hand down its judgement, the Committee notes that the European Commission dismissed this aspect on the basis of a failure to exhaust local remedies, in particular, that this aspect had not been raised before the Federal Constitutional Court. Accordingly, this part of the communication has not been "considered" by another international mechanism so as to be excluded from consideration by the State party's reservation. However, for the same reasons advanced by the Commission, the Committee considers that available domestic remedies in this respect have not been exhausted. This part of the communication is accordingly inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

9.7 In terms of the alleged violations of the daughter's rights under articles 14, 17, 23 and 24, the Committee notes that the author was denied standing by the European Commission to bring a complaint on behalf of his daughter. Accordingly, it cannot be said that the daughter's aspect of the complaint has been "considered" by the European Commission so as to exclude the Committee's competence to examine the case from the daughter's point of view.

9.8 The Committee notes that, according to its jurisprudence, a non-custodial parent is not necessarily excluded from possessing sufficient standing to bring a complaint on a child's behalf. In terms of the alleged violations of the daughter's rights under articles 14, 17, 23 and 24, however, the Committee considers that neither the author's arguments nor the material provided substantiate, for the purposes of admissibility, the adverse effects upon the daughter said to constitute violations of those articles. The Committee would observe in this connection that, despite the daughter having achieved the age of 15 years at the point of the author's last correspondence, there is no indication that the daughter supports any inference that her rights have been violated. Accordingly, the Committee considers this aspect of the communication inadmissible under article 2 of the Optional Protocol.

9.9 In the light of the Committee's foregoing conclusions, the Committee need not address the various remaining arguments on admissibility presented by the author and responded to by the State party.

10. The Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Communication No. 441/1990, declared admissible on 7 July 1993 (CCPR/C/48/D/441/1990).

[2] Communication No. 520/1992, declared inadmissible on 7 April 1994 (CCPR/C/50/D/520/1994).

[3] Communication No. 516/1992, declared admissible on 22 July 1994 (CCPR/C/51/D/516/1992).

[4] Communication No. 397/1990, declared inadmissible on 22 July 1992 (CCPR/C/45/D/397/1990).

[5] Communication No. 568/1993, declared inadmissible on 8 April 1994 (CCPR/C/50/D/568/1993).

[6] Communication No. 397/1990,declared inadmissible on 22 July 1992 (CCPR/C/45/D/397/1990).

[7] Communication No. 417/1990, declared admissible on 25 March 1992, see the Committee's Views of 15 July 1994 (CCPR/C/51/D/417/1990).

[8] Communication No. 440/1990, Views adopted on 3 April 1995 (CCPR/C/53/D/400/1990).

[9] Communication No. 441/1990, declared admissible on 7 July 1993 (CCPR/C/48/D/441/1990).

E. Communication No. 822/1998, Vakoumé v. France, (Decision adopted on 31 October 2000, seventieth session)*

Submitted by: Mr. Mathieu Vakoumé and 28 other persons (represented by Mr. Gustave Téhio, a barrister in Nouméa, and the law firm of Roux, Lang, Cheymol and Canizares, located in Montpellier)

Alleged victim: The authors

State party: France

Date of communication: 11 March 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2000,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Mr. Vakoumé and 28 other persons who claim to be landowners or enjoy customary rights on the Isle of Pines in New Caledonia. They assert that they are victims of violations of articles 17 (1), 18 and 23 (1) of the International Covenant on Civil and Political Rights, by reason of interference with their privacy and family life and with their freedom to manifest their religion or beliefs in worship. The authors are represented by joint counsel - Mr. Téhio, a barrister in Nouméa, and the law firm of Roux, Cheymol and Canizares, located in Montpellier.

Facts and proceedings as they emerge from statements by the authors and from the evidence submitted

2.1 The authors are members of the Touété tribe based in Baie d'Oro on the Isle of Pines in southern New Caledonia, on a reservation established in 1887 where customary rights are exercised. Baie d'Oro is divided into properties held by clans. According to tradition, the representative of each clan must seek the opinion, and obtain the agreement, of every clan member in decisions concerning the use of the land.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 The authors claim to possess customary rights to plots of land on which the company Magénine S.A. had begun construction of a hotel complex. This complex was inaugurated and has been in operation since November 1998.

2.3 The representatives of the Touété tribe, with the exception of the authors, participated in the project for the creation of the hotel complex through the company Magénine S.A., which was established in 1994 especially for that purpose. It was agreed between the representatives of the Touété tribe and the South Province of New Caledonia that the latter would advance the funds needed, so as to provide the tribe with the capital for a 66 per cent holding in the company owning the prospective complex, with the rest of the capital belonging to the Société des hôtels de Nouméa. The representatives of the tribe also provided the company with the usufruct, for a period of 25 years, of the land needed for the construction, the surface area of which is 5 hectares and 37 ares. The authors, who did not take part in this agreement, claim to have rights to the plots of land in question.

2.4 Work began immediately upon receipt of a building permit issued by the South Province Assembly to Magénine S.A. on 30 August 1996. As of December 1996, several petitions from local residents were lodged with the Nouméa Administrative Tribunal seeking to have the building permit revoked. In a decision dated 1 April 1997 the Tribunal revoked the building permit on the grounds that, under article 8 of Provincial Assembly deliberation No. 24 of 8 November 1989, any project for the development of land or buildings, whether or not for residential purposes, must be the subject of an application for authorization in the conditions established by the provincial assemblies, rather than a building permit. The Tribunal also ordered the company to pay the petitioners the sum of CFP francs 100,000.

2.5 On 16 April 1997 Magénine S.A. filed an appeal against that ruling with the Court of Appeal of Nouméa. On 24 April 1997 the authors lodged a request for a default fine with the interim relief judge. On 21 May the judge dismissed the request. The authors appealed against the decision of the interim relief judge on 4 June 1977.

2.6 By decision of 16 October 1997, the Nouméa Court of Appeal quashed the ruling of the interim relief judge of 21 May 1997 and ordered that the decision of the Nouméa Administrative Tribunal of 1 April 1997 should be carried out, and accompanied by a default fine.
On 17 October 1997 the South Province Assembly issued an authorization allowing Magénine S.A. to construct a group of buildings. On 22 December 1997 Mr. Vakoumé and a number of other persons requested the Nouméa Administrative Tribunal to order the suspended execution and annulment of the decision of 17 October 1997. On 16 February 1998 the Nouméa Administrative Tribunal revoked the decision authorizing construction, on the grounds that several local authorities had not been consulted prior to the issue of the building authorization. On 3 April 1998 the South Province appealed to the Paris Administrative Appeal Court against the Nouméa Administrative Tribunal's ruling of 16 February 1998.

2.7 On 26 February 1998 the South Province issued Magénine S.A. with a new building authorization. On 23 March 1998 the authors requested the Nouméa Administrative Tribunal to annul and suspend application of the new authorization of 26 February 1998. The authors claimed, inter alia, that the construction of the hotel would undermine their right to privacy (International Covenant on Civil and Political Rights, art. 17) and to protection of family life (Covenant, art. 23). On 4 June 1998 the Nouméa Administrative Tribunal dismissed the authors' appeal of 23 March 1998, and authorized the building work to continue. The Tribunal found that the construction did not violate the authors' rights as set forth in the International Covenant on Civil and Political Rights, because it had not been proved that the hotel was to be placed on a site where ancestral tombs were located and because the representatives of the tribe had given their consent for the construction. On 4 August 1998 the authors applied to the Paris Administrative Appeal Court to have the judgement of 4 June 1998 quashed.

The complaint

3.1 The authors claim that they are victims of violations of articles 17 (1), 23 (1) and 18 of the International Covenant on Civil and Political Rights.

3.2 They first invoked rule 86 of the rules of procedure of the Human Rights Committee with a view to obtaining implementation of interim protection measures to avoid irreparable damage to them,[1] claiming that the site on which the complex was built was one of special significance for their history, culture and life.

3.3 The authors draw a distinction between two aspects of the violations of rights as set forth in the International Covenant on Civil and Political Rights.

3.4 In the first place, they consider themselves to be victims of violations of articles 17 (1) and 23 of the Covenant. To that effect, they declare that the Baie d'Oro is an important part of their natural, historic and cultural heritage. Ancestral burial grounds are to be found on the site, which is also the source of legends forming part of the heritage and collective memory of the Isle of Pines.

3.5 The authors draw attention to the Human Rights Committee's decision of 29 July 1997 in case No. 549/1993, Hopu and Bessert v. France,[2] concerning the construction of a hotel complex on the site of ancestral burial grounds, which the Committee deemed to be interference with the authors' privacy and family life, constituting a violation of articles 17 (1) and 23 of the International Covenant on Civil and Political Rights. The authors recall that that case, too, concerned the construction of a hotel complex by the same group.

3.6 Regarding the violation of article 18 (1) of the Covenant, the authors consider that building on the ancestral burial grounds constitutes a violation of their right to freedom of thought, conscience and religion. In that connection, it is claimed that the authors, like all Melanesians, live in a natural environment founded on a network of ties to their parents, their families and their dead. Veneration of the dead is a manifestation of religion and tradition inherent in their lifestyle, beliefs and culture.

3.7 That being the case, the authors consider that destruction of the sacred site violates their right to freedom to manifest their religion or beliefs in worship and the observance of rites.

The State party's comments on admissibility

4.1 The State party submitted its comments with regard to communication No. 822/1998 on 4 December 1998. It considers the communication to be inadmissible on the grounds of non-exhaustion of domestic remedies. The State party draws attention to the proceedings brought by the authors after the communication was introduced before the Committee on 11 March 1998. On 23 March 1998 the authors appealed against the South Provinces authorization of 26 February 1998. In addition, on 4 August 1998 the authors filed an appeal with the Paris Administrative Appeal Court against the Nouméa Administrative Tribunal's decision of 4 June 1998 and this appeal is still awaiting judgement.

4.2 The State party also maintains that the proceedings cannot be considered to have been unreasonably prolonged. In less than two years, the case has given rise to an interim relief decision by the Nouméa court of first instance, a ruling by the Nouméa Court of Appeal and three judgements by the Nouméa Administrative Tribunal.

4.3 Finally, the State party contests the admissibility of the communication on the grounds that at no time did the authors submit to the French courts their claim of alleged violation of articles 17 (1), 18 (2) and 23 (1) of the International Covenant on Civil and Political Rights; in its view, this is contrary to article 5 (2) (b) of the Optional Protocol to the International Covenant on Civil and Political Rights.

The authors' response to the State party's comments

5.1 In response to the State party's comments, counsel for the authors submitted a memorandum dated 8 April 1999, pointing out that the hotel complex had already been built and inaugurated and that the injury to the victims was thus fully established. All remedies invoked to end the problem had proved ineffective and futile and there could be no remaining doubt that the said articles had been violated.

5.2 In answer to the State party's contention that all available domestic remedies had not been exhausted, the authors maintain that those remedies had been ineffective and futile to end the problem. No sooner had a decision to stop the work been taken than the company had promptly obtained a new permit from the Provincial Assembly and continued to build. As a result, the authors were unable to have the illegal construction halted.

5.3 In the authors' view, the fact that a judicial decision, accompanied by a default fine, ordering the cessation of the work was never respected and the fact that the company continued its illegal construction, with the approval of the President of the Provincial Assembly, constitutes a gross violation of the right of every individual to an effective remedy. The repetition of those illegal acts and their toleration by the State authorities constitute practices which render legal remedies ineffective and futile.

5.4 With regard to the Government's allegations that the authors did not invoke violations of their fundamental rights and freedoms, the authors cannot but deplore the bad faith of the State party. Counsel had repeatedly invoked violations of the Covenant and other international instruments.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes from the documents presented that the State party's allegations to the effect that the authors did not claim before the judicial or administrative courts that the construction constituted a violation of their privacy, freedom of conscience and religion, and family life cannot be upheld. In fact, it has been established that counsel for the authors put forward such claims, in particular in the appeal against the building authorization of 26 February 1998, and that the Nouméa Tribunal's decision of 4 June 1998 took them into account.

6.3 The Committee notes that the State party contests the admissibility of the communication on the grounds of non-exhaustion of domestic remedies given that the authors did not await the outcome of their appeal.

6.4 With regard to the authors' statements that the domestic remedies were ineffective because the hotel complex had already been built and because the authorities had not respected the court decisions in favour of the authors, the Committee notes that after the decision of the Nouméa Court of Appeal of 16 October 1997 ordering a halt to the construction and payment of a default fine because of the lack of valid administrative authorization, the authorities then granted such authorization, thus making the continuation of the construction legal. It appears, therefore, that the court decisions in favour of the authors were largely based on construction regulation requirements and that there is nothing to indicate that the authorities did not respect the court decisions.

6.5 With regard to the State party's assertion that domestic remedies were not exhausted given that the authors did not await the outcome of their appeal and the authors' counter-argument that recourse to the Paris Administrative Appeal Court and, if necessary, the Council of State, would be ineffective, the Committee cannot accept counsel's contention that given that the construction has already been completed, the courts would no longer be able to guarantee an appropriate remedy. Accordingly, the Committee is of the view that the communication is inadmissible under article 5 (2) (b) of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5 (2) (b) of the Optional Protocol;

(b) That this decision will be transmitted to the State party and to the representative of the authors of the communication;

(c) That this decision may be reviewed under rule 92 (2) of the Committee's rules of procedure upon receipt of a written request by or on behalf of the authors containing information to the effect that the reasons for inadmissibility no longer apply.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Committee, acting through its Special Rapporteur on New Communications, did not grant this petition.

[2] CCPR/C/60/D/549/1993/Rev.1, Views adopted by the Committee on 29 July 1997.

F. Communication No. 831/1998, Meiers v. France (Decision adopted on 16 July 2001, seventy-second session)*

Submitted by: Mr. Michael Meiers (represented by Mr. Roland Houver)

Alleged victim: The author

State party: France

Date of communication: 11 February 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 2001,

Adopts the following:

Decision on admissibility

1. The author of the communication is Michael Meiers, a French citizen residing in Belfort. He accuses the French authorities of a violation of article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

The facts

2.1 The author completed a probationary appointment in the French National Police from November 1987 to 1 January 1990. He was not granted a permanent appointment at the end of the probationary period and was dismissed from employment by the Minister of the Interior on 27 December 1989.

2.2 He appealed the latter decision to the Administrative Tribunal of Versailles, which, by a judgement of 17 December 1991, almost two years later, quashed the decision not to grant him a permanent appointment. Subsequently, because of the unwillingness of the Administration to comply with the ruling, the author turned to the claims section of the Council of State, asking to be reinstated. This induced the Minister of the Interior to decide, on 17 April 1992, that the author should be reinstated as from 1 January 1990.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.3 However, on 23 March 1992, the Minister of the Interior appealed the ruling of the Administrative Tribunal of Versailles to the Council of State. Owing to an error in the postal address, the author was not notified by the Belfort Prefecture of the appeal or its underlying arguments until 19 November 1992. The author then sought the services of counsel, who filed observations in his defence with the Council of State on 20 July 1993.

2.4 After hearing nothing further about the matter, the author went on 3 July 1995 to the competent subsection of the Council of State to make inquiries. In response to his questions, the Council of State informed him by mail on 21 August 1995 that the preparation of his file was complete and that the rapporteur had filed his conclusions on the case but that it was nevertheless impossible to specify the date of the hearing.

2.5 The hearing "apparently" was held on 11 December 1996, but the author was not told about it and therefore was not present. The Council of State reversed the ruling of the Administrative Tribunal of Versailles and sided with the Administration. Its judgement was communicated to the parties on 14 January 1997.

2.6 The author observes that the procedure in the original jurisdiction took two years, which he maintains is an unreasonably long period of time for a matter involving the reinstatement of a public servant. Moreover, the procedure before the Council of State also was unduly prolonged, taking four years and ten months from the filing of the appeal to the notification of the judgement. In all, therefore, the proceedings took almost seven years.

The complaint

3.1 The author considers that the time taken by the administrative authorities to rule in his case was unreasonable, whether account is taken of the entire proceedings or only the part of them before the Council of State, and that there is therefore a flagrant violation of article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

3.2 The author submits that the time taken is all the more unreasonable because the file presented no particular difficulty, he himself did nothing to obstruct the smooth conduct of the procedure and once his conclusions were filed with the Council of State in July 1993 the case was ready to proceed.

3.3 Furthermore, the author notes that the Administrative Tribunals Code sets a time limit of 60 days for the filing of statements in reply by the parties, a time limit which has hardly ever been respected by the Administration. Because of this, the European Court of Human Rights has ruled against the State party a number of times (Vallée v. France, ECHR 26 April 1994; Karakaya v. France, ECHR 8 February 1996).

3.4 As to the consequences of the prolonged proceedings, the author maintains that, as a result of the decision of the Council of State, he again found himself in the situation of five years earlier. Accordingly, even if he does not contest that the salary received by him during those years should remain his under the completed-service rule, he submits that the Administration will seek restitution of the allowance paid by it for the duration of the procedure in the original jurisdiction when he was not in post.

3.5 In addition, following his reinstatement in post, the author continually encountered problems with his supervisors, and those problems finally led to his removal from post on 4 April 1996 owing to his refusal to attend various psychiatric consultations which he regarded as inopportune. In the meantime, the author set in motion a considerable number of procedures (appeal against ultra vires action, liability procedure, procedures before the Medical Council, ...) which he would not have initiated if the Council of State had ruled within a reasonable time period.

3.6 The author evaluates the extent of the harm suffered on account of the length of the procedure at 3 million French francs (+/-428,000 United States dollars).

3.7 As to the admissibility of the communication, the author states that he was unable to bring an action before the European Court of Human Rights because the Court considers that disputes of established public servants in disciplinary matters are not "civil ... obligations" within the meaning of article 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3.8 On the principle of admissibility before the Committee, on the other hand, the author refers expressly to the decision of the Committee in its Casanovas case (Casanovas v. France, 441/1990, 19 July 1994), in the course of which it was to consider that a procedure for dismissal of an official did indeed challenge his civil rights within the meaning of article 14, paragraph 1, of the Covenant. The author seeks the application of this decision in his case.

Information and observations of the State party regarding the admissibility of the communication

4.1 The State party considers that the communication is not admissible because it does not fall within the scope of article 14, paragraph 1, of the Covenant.

4.2 First of all, not granting a permanent appointment after a probationary period is not a disciplinary procedure and therefore by no means constitutes a criminal charge. In this regard, the State party makes a distinction between a disciplinary procedure occurring during or at the end of a probationary period and a decision marking the end of the probationary period in which a permanent appointment is not granted for reasons relating to the candidate's professional aptitude, as happened in the case of the author. While the law attaches important consequences to the disciplinary procedure as the grounds for decisions and the communication of the case, the same is not true of a decision not to grant a permanent appointment, which confirms the non-disciplinary nature of the latter.

4.3 Next, while the State party is aware of the Committee's decision in the Casanovas case, cited earlier, it nevertheless considers that the decision is not relevant in the present case, since the dispute, even if it involves a pecuniary interest for the author, relates to a moment in a public servant's career when the discretionary powers of the Administration are most marked and when the control of the judge is limited to finding a manifest error of evaluation.

4.4 In this respect, the State party recalls the decision of the European Court of Human Rights that disputes relating to the recruitment, career and cessation of functions of an official do not fall within the scope of article 6, paragraph 1, of the European Convention on Human Rights except insofar as they are of an asset-related nature, the latter term being interpreted in a very restrictive way.

4.5 It should be noted that article 14, paragraph 1, of the Covenant is drafted in very similar terms to those of the aforementioned article 6. Accordingly, to the extent that the present dispute does indeed appear to relate to the author's failure to secure a permanent appointment and in order to maintain consistency in the interpretation of international instruments, the State party deems that it would be desirable for the Committee to declare the communication inadmissible on the ground that it does not fall within the scope of article 14, paragraph 1, of the Covenant.

4.6 On a subsidiary point concerning the merits of the communication, the State party maintains that the author cannot claim to be a victim of a violation of the Covenant because the length of the proceedings before the Council of State did not prejudice his rights, the initial decision of the Administrative Tribunal of Versailles having already quashed the decision not to grant him a permanent contract, which meant that the author continued to work and to receive a salary in the normal way for completed service.

Author's reply to the State party's observations

5.1 The author recalls that in the Casanovas case the Committee was indeed of the opinion that a procedure to dismiss an official from employment was a challenge to civil rights within the meaning of article 14 of the Covenant.

5.2 The author considers that the same legal reasoning should apply in the present case. The procedure to dismiss in the Casanovas case resulted in the loss of employment with accompanying pecuniary consequences. Likewise, the decision not to grant permanent status following a probationary period constitutes, in the case of the author, a refusal to provide definitive employment, with identical pecuniary consequences. It is therefore a clear-cut case of challenge to a civil right, whose principal feature is its asset-related character.

5.3 In any event, the author points out that what is at issue here is to challenge, not the decision on the permanent appointment, but the length of the procedure, a question which is undoubtedly covered by the terms of article 14 of the Covenant.

5.4 In relation to the merits of the communication, the author considers that the material and moral prejudice deriving from the unreasonable time of the procedure is manifest. The procedures initiated by the author after the initial decision of the Administrative Tribunal were dismissed following the judgement of the Council of State. But if the author had been informed promptly of the appeal lodged by the Administration and if the Council of State had reached its decision within a reasonable time, the cost of the subsequent procedures could have been avoided.

Committee's decision on admissibility

6.1 Before considering a complaint submitted in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, determine whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes the State party's observations on the admissibility ratione materiae of the communication and the State party's and the author's argument that the ratio decidendi of the Casanovas case applies in the present case.

6.3 The Committee is of the opinion, however, that whereas there is no need to consider the scope of article 14, paragraph 1, of the Covenant, and while it expresses some concern at the length of the procedure, the author has not sufficiently established in the present case that the length of the procedure before the French administrative authorities concerning the decision of 23 December 1989 not to grant him a permanent appointment caused him genuine prejudice, firstly because he received compensation for the period prior to his reinstatement in 1992 and secondly because he continued to work and to receive a salary until his dismissal in 1996.

7. The Human Rights Committee therefore decides:

- that the communication is inadmissible in accordance with article 2 of the Optional Protocol;

- that this decision shall be communicated to the State party and to the representative of the author of the communication.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

G. Communication No. 832/1998, Walravens v. Australia (Decision adopted on 25 July 2001, seventy-second session)*

Submitted by: (F) (name withheld)

Alleged victim: The author's son, C (name withheld)

State party: Australia

Date of communication: 22 July 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2001,

Adopts the following:

Decision on admissibility

1. The author of the communication is F (name withheld), presenting a communication dated 22 July 1998 on behalf of her son, C (name withheld), born 10 July 1979. She claims that her son is a victim of violations by Australia of article 26 of the International Covenant on Civil and Political Rights.

The facts as presented

2.1 From 24 February to 2 March 1993 and again from 12 to 18 March 1993, the author's son was suspended with a recommendation for exclusion from Year 8 at Miami State High School. The conduct giving rise to the suspensions included gross insolence, deliberate and persistent disobedience and deliberate provocative behaviour which adversely affected staff and students.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of an individual opinion signed by one committee member is appended to this document.

2.2 From 21 April 1993 to 15 December 1993, the author's son attended Barrett Adolescent Centre, a short-term residential facility for adolescents aged 13 to 17 who suffer from emotional, behavioural and psychiatric disorders. During this period, he was medically diagnosed as having Oppositional Defiance Disorder, which has multiple aetiologies. The diagnosis considered that the condition of the author's son had directly affected his behaviour in the past and was likely to affect his behaviour in the future. It also indicated that the behaviour of the author's son was within his control and could be improved with appropriate behaviour management strategies.

2.3 In early 1994, it was proposed that the author's son should be enrolled at Merrimac State High School, a school close to home and with a special needs unit on site. The school's administration, in conjunction with the State's education department, proposed however that in the light of past experience the author's son, the author and the principal would sign a behaviour management contract mutually negotiated prior to enrolment. Such a contract typically sets out the roles and responsibilities to be accepted by each party to facilitate the child's return to school within a framework of working towards acceptable behaviour. After a variety of draft contracts were developed, the author terminated the discussions. She requested that her son be able to return to school and that he should not be expected to control his behaviour.

2.4 On 11 April 1994, a complaint was lodged with the Human Rights and Equal Opportunity Commission ("the Commission") alleging discrimination against the author's son on the grounds of disability. After a conciliation conference on 6 November 1996 where the author expressed concern that her son had not completed his education, he was offered re-entry at Year 11 with an education programme tailored to his needs. She declined the offer on the basis that her son was too hurt by his experiences at school to return.

2.5 On 20 May 1997, the Disability Discrimination Commissioner of the Commission concluded that there was no evidence that the requirement that the author's son sign a pre-enrolment agreement constituted unlawful discrimination. She found no direct discrimination in that he had been required to sign an agreement because of his behaviour and previous suspensions, like other students with behavioural concerns, and not because of a disability. Nor was indirect discrimination found, for the author's son was considered on the evidence to be able to meet goals set, and choose to accept authority and control his behaviour. The behavioural goals set were tailored to him and progressive, and school staff were to be specifically trained to deal with the difficulties of the author's son. In the circumstances, the contract was found to be reasonable and not discriminatory. On 4 August 1997, the President of the Commission confirmed the decision and dismissed the complaint.

The complaint

3.1 The author makes a series of allegations, centred around a claim of discrimination on the grounds of disability in violation of article 26 of the Covenant. She alleges initially that the Commission in addressing her claim of discrimination failed to consider and apply the Declaration on the Rights of the Child, the Declaration on the Rights of Disabled Persons and the Australian Constitution. The Commission is also said to have failed to obtain relevant evidence and relied exclusively on information and materials of the education authorities.

6.2 As to the State party's contention that the communication has been insufficiently substantiated for purposes of admissibility, the Committee notes that the communication centres upon the factual and evidential evaluation of the condition of the author's son and of his capacity to control and improve his behaviour. The Human Rights and Equal Opportunity Commission assessed these and other circumstances in coming to the conclusion that the author's son had been treated, as others in like situation, on the basis of his previous and expected future behaviour, that the contract was reasonable in the circumstances and that he had not suffered discrimination. In the light of the findings of the Commission, the Committee finds that the author has failed to demonstrate that the required contract was not based upon reasonable and objective grounds, and accordingly considers that the author has failed to substantiate her claims for the purposes of admissibility. Accordingly, the communication is inadmissible under article 2 of the Optional Protocol.

6.3 The Committee notes the State party's argument that the author lacks standing to bring the communication, but also considers that there may be doubts in the circumstances as to whether the son was in a position to supply formal authorization. However, in the light of the Committee's findings above, it is unnecessary to address that or any other remaining argument on admissibility that has been advanced.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Committee member Mr. Abdelfattah Amor

I do not agree with the argument on the inadmissibility of this communication as accepted by the Committee. The communication should have been declared inadmissible on other grounds which are a precondition for its consideration, namely, that the mother (Ms. F) does not have the authority to represent her son (C).

1. C was already of age when the communication was submitted to the Committee in 1998;
2. Ms. F has not been given power of proxy by her adult son for this purpose;
3. Although C appears to have behavioural problems, no document from a competent authority establishes that he has a handicap or a statutory disability;
4. In any case, the mother's assertion that her son is handicapped is not sufficient for him to be duly represented by her before the Committee.

(Signed) Abdelfattah Amor

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

H. Communication No. 834/1998, Kehler v. Germany, (Decision adopted on 22 March 2001, seventy-first session)*

Submitted by: Mr. Waldemar Kehler

Alleged victim: The author

State party: Germany

Date of communication: 5 May 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 2001,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 5 May 1998, is Waldemar Kehler, a German national. He claims to be a victim of violations by the Federal Republic of Germany of several provisions of the Covenant. He is not represented by counsel.

1.2 The International Covenant on Civil and Political Rights entered into force for the State party on 23 March 1976, and the Optional Protocol on 25 November 1993. Upon acceding to the Optional Protocol, the State Party entered a reservation to the Optional Protocol which reads, inter alia: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications (a) which have already been considered under another procedure of international investigation or settlement."

The facts as presented

2.1 The author's two children, Sonja and Nina, were born on 30 December 1981 and 20 February 1983 respectively from his marriage to Anita Kehler. After the author suffered long-term disability through an accident and illness, the spouses separated, with the wife moving out of the common dwelling with both daughters on 29 May 1995.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfick Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.2 By provisional order of 12 June 1995, the Dieburg Local (Family) Court granted the mother the right to determine the place of residence of the children during the period of separation. On 28 June 1995, the court referred the proceedings to the Tuttlingen Local Court after oral hearing, as the author had previously applied to the latter court for custody to be granted to himself. On 7 August 1995, following the children's indication that they wished to remain with their mother, the Tuttlingen court upheld the provisional arrangement of the right to determine place of residence which had been made by the Dieburg court.

2.3 On 17 October 1995, following representations by the author that the children's expressed wishes were not free of pressures, the Tuttlingen court ordered a psychiatric examination of the children. Multiple individual interviews with both children and parents as well as psychiatric tests indicated that these wishes were genuine. Accordingly, on 21 February 1996, the Tuttlingen court confirmed the award of custody to the mother. The author was provided with access to the children one weekend per month and further holiday access. The author's appeal against that decision was rejected by the Stuttgart Higher Regional Court on 20 September 1996. On 5 June 1997, the Dieburg court ordered the author to pay maintenance for the children and their mother.

2.4 On 18 July 1997, the author wrote to the Tuttlingen court seeking enforcement of the visiting arrangements. The judge stated that the court was not in a position to enforce the judgement as the author's children now refused to see him. On 27 October 1997, the Dieburg court rejected an application by the author for transfer of custody of the children and a fine for the mother following an unsuccessful attempted visit to the children.

2.5 On 20 January 1998, the Frankfurt a. M. Higher Regional Court amended the custody arrangements, providing the author with more frequent access to the children every second Saturday of the month from 11 am to 5 pm. The court ordered that this arrangement was to be complied with by both parties upon pain of financial penalty. On 25 March 1998, the Federal Constitutional Court rejected the author's constitutional complaint.

2.6 On 25 May 1998, the European Commission of Human Rights declared inadmissible the author's complaint, which had been filed on 1 September 1996 and registered on 3 October 1997 under file No. 38012/97, finding that the application did not disclose any appearance of a violation of the rights and freedoms set out in the European Convention or its Protocols.

The complaint

3. The author claimed violations of his and his children's rights, which look to raise issues primarily under articles 23 and 24 of the Covenant. He initially focused on the contention that the deprivation of access to his children by the mother constituted child abduction and that State complicity existed in a failure to enforce access and in the failure to bring criminal charges against the author's former wife. More recently the author contends that visiting arrangements requiring him, in condition of serious disability, to travel long distances to visit his children constitutes torture.

The State party's information and observations with regard to the admissibility of the communication

4.1 The State party considers it manifest that the communication has already been considered under another procedure of international investigation or settlement, and the Committee's competence is therefore excluded by paragraph (a) of the State party's reservation.

4.2 The State party further contends that there are considerable doubts as to whether domestic remedies have been exhausted. Since the Federal Constitutional Court does not provide the grounds upon which the application was rejected and the author has not supplied his application to the Court, the fact that the Federal Constitutional Court did not accept a claim for adjudication is not of itself sufficient, in this multi-faceted and prolonged litigation, to demonstrate that domestic remedies have been exhausted.

4.3 The State party also considers the communication to be seriously deficient in the material transmitted and the statements made which fail to specify any objective reason for the application and requests that the author be asked to supply further clarification. In particular, the State party argues that the author does not reveal which domestic decisions he is contesting, nor in which respect(s) the author considers a violation of the Covenant to have occurred.

Author's response to the State party's information and observations with regard to the admissibility of the communication

5. In response to the State party's submissions, the author makes a variety of comments on recent German law and jurisprudence regarding family issues, correspondence with members of Parliament and others, general discussion on international cross-border cases of child abduction in Germany and other countries, accounts of his state of health and medical history, and repeated allegations as to the conduct of his wife and other persons involved in his cases.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes the State party's contention that paragraph (a) of the reservation entered upon its accession to the Optional Protocol excludes the Committee's competence to examine the author's claim because the same matter has already been considered under another procedure of international investigation or settlement. In this connection, the State party has informed the Committee that the European Commission of Human Rights declared the author's complaint inadmissible on 3 October 1997, finding that the application did not disclose any appearance of a violation of the rights and freedoms set out in the European Convention or its Protocols. In view of the author's failure to supply his application to the Commission, the absence of any recitation of facts or reasoning in the Commission's decision, and the broader provisions of the Covenant which touch upon present issues, the Committee possesses insufficient information to determine the applicability of the State party's reservation to the present communication.

6.3 Nevertheless, with respect to the author's various claims made primarily under articles 23 and 24 of the Covenant, the Committee considers that the author has failed to substantiate his claims for purposes of admissibility, and accordingly declares them inadmissible under article 2 of the Optional Protocol. In the circumstances, therefore, it is unnecessary for the Committee to address the remaining arguments on admissibility raised by the State party.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol.

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

I. Communication No. 866/1999, Torregrosa Lafuente et al. v. Spain (Decision adopted on 16 July 2001, seventy-second session)*

Submitted by: Mrs. Marina Torregrosa Lafuente et al.
(represented by Mr. José Luis Mazón Costa)

Alleged victims: The authors

State party: Spain

Date of communication: 13 June 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 2001,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Mrs. Maria Torregrosa Lafuente and 21 other persons, all of them Spanish citizens residing in Spain. They claim to have been victims of violations by Spain of their rights under article 2, paragraph 3, article 14, paragraph 1, article 25 (c) and article 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as presented by the authors

2.1 In 1991, the Ministry of Justice announced a competitive examination to fill vacancies in the Justice Administration Officers' Corps. The rules of the announcement established that, once the written tests had been held, the first court of Madrid would publish a provisional list of the applicants who had passed the examination. The court would make this list final once any possible factual errors that it might contain had been corrected, allowing a period of 10 calendar days for the submission of claims. The court understood the term "factual errors" to mean errors in the personal data of the applicants or in the calculation of the scores.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of an individual opinion by one Committee Member is appended to this document.

2.2 On 21 September 1992, the final list was published, from which 131 competitors who had been listed in the provisional list were dropped, among them the authors. The persons concerned asked for explanations from the Ministry of Justice, which replied that changes had been made because a first computerized correction of the examination papers had counted as not valid any answers with double entries or badly erased entries, while, in a second correction, the court had decided to count them as valid.

2.3 The authors allege that the correction of the examination papers was done improperly in the following respects:

(a) The first court of Madrid carried out an official review, wrongly assuming that "factual error" could cover questions such as the following: (i) whether double-entry answers were valid; (ii) whether or not the use of an eraser was legitimate; (iii) whether or not badly erased entries should be counted as valid;

(b) The court used photocopies, not originals, to deal with complaints about the provisional list, thus making it difficult to determine how thoroughly an entry had been erased;

(c) The authors had had no opportunity to challenge the court's change of rules;

(d) The rules of the official announcement of the competition were violated when the final list excluded 131 applicants who had appeared in the provisional list;

(e) The first court lacked jurisdiction to review the examination results because it was authorized only to correct mere factual errors;

(f) Question 47 on the written examination should have been disregarded because any of the proposed answers was valid. Question 54 was phrased in such a way that did not make sense;

(g) The court decided to select an applicant who had not followed the instructions on how to answer the questions. That decision entails a violation of the right to equality of opportunity for access to public posts and constituted a clear procedural irregularity that was contrary to the basic right provided for in article 23, paragraph 2, of the Constitution.

2.4 The authors allege that the provisional list contained no factual errors and that the court corrected the examination a second time without observing the rules as announced, without hearing the persons concerned and in violation of its own decision that the provisional list would be made final unless the overseeing courts discovered some error. The repeated jurisprudence of the Supreme Court stipulates that a factual error has to be obvious, clear and indisputable, and not a matter of opinion or of the interpretation of the applicable legal rules. The Supreme Court has also stated that the official announcement of a competitive examination setting out the conditions under which it will be held is the binding rule governing that examination.

2.5 The authors filed an application for reconsideration, which was not ruled on until 11 March 1993. In the meantime, they applied for an administrative remedy before the National High Court. In a judgement of 8 February 1996, a copy of which is attached to the communication, the High Court rejected the authors' allegations, basing its decision on the jurisdiction that the official announcement gave to the first court and drawing attention to earlier decisions along the same lines.

2.6 Lastly, the authors applied for a remedy of amparo to the Constitutional Court, which decided on 16 December 1996 that it was inadmissible because, contrary to the authors' allegations, there had been no violation of article 23, paragraph 2, of the Constitution or of the right to effective legal protection under article 24 of the Constitution.

The complaint

3.1 Counsel alleges that the facts described are contrary to the following provisions of the Covenant:

- Article 25 (c), which recognizes the right of all citizens to have access, on general terms of equality, to public service in their country, since the selection process in which they took part was clearly arbitrary.

- Article 2, paragraph 3 (a), which recognizes the right of any person whose rights or freedoms as recognized in the Covenant are violated to have an effective remedy. As a result of the existing system for reviewing the legality of examinations and competitions and the lengthy intervals between the initiation of the challenge to the decision and the ruling of the court, the right to a remedy against improperly conducted competitions and examinations becomes a dead letter because any court takes account of the practical significance of its decision and of the value of an administrative remedy when the incidents occurred several years previously (more than three and one-half years in this case) and a large number of candidates who obtained posts through the examination have already established de facto personal and family situations.

- Article 14, paragraph 1, because the judgement of the National High Court uses the argument that the conditions laid down in the announcement are not compulsory, and this is unacceptable from the point of view of the normal application of legal rules and thus contrary to the right to reasonable grounds for the judgement. Moreover, the judgement fails to answer the complaint concerning the correction of the test papers of the candidate referred to in paragraph 2.3 (g) above. As to the complaint that the test papers included a meaningless question that was not subsequently deleted, the judgement asserts that the Supreme Court's doctrine affirms that the overseeing court evaluates questions and answers. This argument is a denial of justice.

- The authors regard the fact that, in the amparo proceedings before the Constitutional Court, they were denied the opportunity to appear without being represented by counsel[1] to be contrary to article 14, paragraph 1, and article 26 of the Covenant, since article 81, paragraph 1, of the Constitutional Court Organization Act allows a lawyer, but not a lay person, to represent himself or herself or to appear without counsel, thus exonerating the lawyer from expensive private correspondence. This difference in treatment creates an unacceptable lack of equality from the standpoint of the Covenant.

3.2 The authors request recognition of their right to obtain redress because of the irregularities which occurred both in the selection process and in the subsequent judicial proceedings.

The State party's submission

4.1 In its submission dated 22 June 1999, the State party contests the admissibility of this communication on the basis of article 3 and article 5, paragraph 2 (b), of the Optional Protocol. With regard to the alleged violation of article 25 (c), it states that the authors have not experienced any lack of equality in access to public service. Their complaint is aimed at proceedings which they characterize as "arbitrary and unfair". However, the characteristics of judicial proceedings have nothing to do with article 25 (c) of the Covenant.

4.2 With regard to the alleged violation of article 2, paragraph 3 (a), of the Covenant, the State party characterizes the argument that there was "psychological pressure" on the court as unserious. In addition, it maintains that there can be no allegation of the non-existence of a remedy following a violation when the competent body, i.e. the Human Rights Committee, has not yet recognized the existence of such violation.

4.3 With regard to the alleged violation of article 14, paragraph 1, of the Covenant, the State party notes that the court ruled according to law and provided extensive and well-reasoned grounds for its decision. Disagreement with the judgement is not sufficient cause to allege a violation. If all unfavourable judgements could be criticized as being based on non-serious grounds, the conclusion is that the only serious and reasonable grounds would be those that support a party's claim.

4.4 As to the requirement of an attorney in proceedings before the Constitutional Court, article 81, paragraph 1, of the Court's Organization Act provides that "natural or legal persons whose interest qualifies them to appear in constitutional proceedings as plaintiffs or additional parties shall entrust their representation to counsel and shall act under the guidance of an attorney. Persons holding a law degree may appear on their own behalf in order to defend their own rights and interests, even if they do not exercise the profession of attorney or lawyer". In the judicial proceedings, the authors were assisted by counsel and represented by an attorney without any complaint. The alleged violation reflects abstract disagreement with a legal principle on the part of the authors' lawyer that is absolutely uncharacteristic of a person who is the victim of a violation of a right guaranteed by the Covenant. Moreover, the authors abandoned that complaint before the Constitutional Court. If an allegation is abandoned in local proceedings, it cannot now be revived before the Committee.

Counsel's comments

5.1 Counsel reiterates his arguments regarding the violation of article 2, paragraph 3 (a), article 25 (c) and article 14, paragraph 1, of the Covenant. With regard to the Constitutional Court's requirement that plaintiffs be represented by a lawyer, counsel states that the difference in treatment between lawyers and non-lawyers should be resolved by also giving non-lawyers the possibility of not using a lawyer; that would be consistent with article 14, paragraph 1, of the Covenant, which guarantees the equality of all persons before the courts and tribunals. If, in the end, the authors appeared with a lawyer, they did so not because they abandoned their claim, as the State party indicates, but because of the negative reply given by the Constitutional Court to the application submitted, in which counsel requested that his clients should be given the benefit of article 81, paragraph 1, of the Organization Act. In its decision of 20 May 1996, the Court rejected the request, arguing that the benefit in question "is based on safeguarding the full fundamental right of defence, as that would be diminished by the parties' lack of technical knowledge, with their chances of success being reduced".

5.2 Counsel states that the Constitutional Court's argument is inconsistent, since using a lawyer has nothing to do with safeguarding the right of defence or with the parties' technical knowledge, for which counsel remains responsible. The only practical significance of not using a lawyer would be that communications would be sent directly to the party concerned and not through the lawyer. The Constitutional Court's argument on this point also violates the right of due process, which includes the obligation to give impartial consideration to the party's arguments and to avoid giving reasons known to be false. Counsel adds that, in connection with this part of the complaint, the Constitutional Court cites article 6, paragraph 3 (c), of the European Convention on Human Rights and article 14, paragraph 3 (d), of the Covenant, attributing the citations to the amparo applicants, who never referred to the rights of the accused in criminal matters, but to the right to a fair trial provided for in article 14, paragraph 1 (not article 14, paragraph 3 (d)). This conduct on the Court's part constitutes a new complaint which counsel has added to the communication.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee considers that the authors' claim of irregularities in the selection process is based on an interpretation of the scope of the jurisdiction of the first court to determine the criteria that should have been taken into account in the preparation of the final list of candidates who passed the competitive examination. In the light of all the available information, the Committee observes that this circumstance was outlined before the local courts and that the National High Court took a decision on it in its judgement of 8 February 1996. The Committee recalls that, in general, it is the responsibility of the appeal courts in States parties, not the Committee, to review the findings of facts in a case and the way in which national courts and authorities have interpreted national laws unless it can be proved that the courts' decisions were clearly arbitrary or constituted a denial of justice. The authors' argument and the material which they provided did not, for the purposes of admissibility, substantiate their claim that the judicial review of the conduct of the first court was arbitrary or constituted a denial of justice. Accordingly, the communication is inadmissible under article 2 of the Optional Protocol with regard to the complaint of the violation of article 25 (c), article 2, paragraph 3 (a), and article 14, paragraph 1, of the Covenant.

6.3 As to the allegations of the violation of article 14, paragraph 1, and article 26 of the Covenant on the ground that the authors were denied the opportunity to appear before the Constitutional Court without being represented by counsel, the Committee believes that the information provided by the author does not describe a situation that comes within the scope of those articles. The author claims that it is discrimination not to require persons with a law degree to be represented before the Constitutional Court by counsel when persons without a law degree are required to be so represented. The Constitutional Court's decision explains the reason for the requirement in article 81, paragraph 1, of the Constitutional Court Organization Act, viz. to ensure that a person with knowledge of the law is in charge of applying for a remedy before the Court. The Committee does not consider the authors' allegations that such a requirement is not based on objective and reasonable criteria to have been satisfactorily substantiated for the purpose of admissibility. It therefore considers that this part of the communication is inadmissible.

The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] Counsel is a person qualified in law and a member of the Bar Association whose function it is to represent [clients] in most judicial proceedings, see to the settlement of lawsuit costs and take an active part in all official decisions and proceedings.

APPENDIX

Individual opinion by Ms. Christine Chanet (dissenting)

I disagree with the Committee's decision taken on the grounds given in paragraph 6.3. The privilege allowed to law graduates under the Spanish civil procedure, which does not require them to be represented by counsel in court proceedings, in my view raises prima facie a question regarding article 2, 14 and 26 of the Covenant.

It is possible that the State party may put forward convincing arguments to justify the reasonableness of the criteria applied, both in principle and in practice.

Only an examination of the case on the merits, however, might have yielded the answers required for any serious consideration of the case.

(Signed) Christine Chanet

[Done in English, French and Spanish, the French text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

J. Communication No. 905/2000, Asensio López v. Spain (Decision adopted on 23 July 2001, seventy-second session)*

Submitted by:	Mr. Francisco Asensio López (represented by Mr. José Luis Mazón Costa)
Alleged victim:	Author
State party:	Spain
Date of communication:	12 July 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 2001,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 12 July 1999, is Mr. Francisco Asensio López, a Spanish citizen, who claims that the judgement handed down in an action brought by his wife for a review of their separation arrangements constituted defamation. He also alleges that the courts failed to deal with the criminal suit he filed on account of insulting and slanderous statements contained in that judgement. He claims to be the victim of a violation by Spain of article 14, paragraph 1, of the International Covenant on Civil and Political Rights. The author is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 An action for a review of separation arrangements was brought against Mr. Francisco Asensio López by his wife, from whom he was legally separated. The judgement of the court of first instance of 31 May 1996, which terminated the proceedings, contained references to the author's state of mind. It stated that "it was not possible to obtain the prescribed expert opinion assessing his psychiatric state, which would certainly have found that he suffers from some kind of mental disturbance. This may be gathered just from talking to him or reading one of the complaints he has lodged: Mr. Asensio is clearly using his daughter to waste the time of the three courts in this district, misusing his rights and directing unjustifiable public criticism, through statements in the newspaper La Opinión - thus bringing them to the attention of the public - against the presiding judges, the lawyers who have rendered him proper assistance since the separation - they have all withdrawn their services, a step accepted as being more than justified - and the officers of the Molina de Segura local police force."

2.2 On 1 July 1996, the author lodged a complaint with the Guardia Court against the humiliating language used by the court in the judgement of 31 May 1996, alleging that it could be characterized as insulting or slanderous. The complaint was drafted by the author himself as a layman. Since the body competent to hear complaints against judges in the jurisdiction concerned is the High Court of Justice in Murcia, the complaint was referred to that court and was dismissed on 10 September 1996. The Court informed the author that he had three days to submit an application for reconsideration, and this was done by the author on 3 October 1996.

2.3 On 9 October 1996, the High Court of Justice in Murcia informed the author that it would not consider the application since the assistance of counsel was required for its consideration.

2.4 The author, assisted by counsel, submitted the application for reconsideration on 30 October 1996 to the High Court of Justice in Murcia, which took no decision until 25 February 2000.

The complaint

3.1 The author argues in the communication he submitted to the Committee that the statements contained in the judgement of the court of first instance of 31 May 1996 constitute a clear violation of his right to an impartial and objective hearing. He furthermore considers that referring in the judgement to the defendant as a person "suffering from some kind of mental disturbance" without any psychiatric evidence to support such a claim constitutes an act that is not only frivolous but also incompatible with article 14, paragraph 1, of the Covenant.

3.2 With regard to the dismissal order by the High Court of Justice of 10 September 1996, the author argues that such a decision violates the right to fair and impartial consideration of a complaint against a judge for damaging the author's reputation in the judgement rendered. The author therefore contends that there was a denial of justice since the court declined to examine the merits of the case, thus violating article 14, paragraph 1.

3.3 The author argues that he has exhausted all domestic remedies with his application to the High Court of Justice, the highest judicial body in the Autonomous Community of Murcia. He attributes his failure to bring an amparo application before the Constitutional Court to the unlikelihood of its success.

3.4 The same matter is not being examined under another procedure of international investigation or settlement.

Information and observations of the State party and comments of the author on admissibility

4.1 In its observations of 7 February 2000, the State party challenges the admissibility of the communication, arguing that Asensio López has not exhausted all domestic remedies since he had the possibility of appointing counsel and submitting the application for reconsideration in the proper manner.[1]

4.2 In his comments of 17 May 2000, the author replies that although the application for reconsideration was filed on 30 October 1996, the High Court of Justice took its decision only on 25 February 2000, when the application was dismissed. The author therefore considers that domestic remedies have been exhausted.

Issues and proceedings before the Committee

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 With regard to the requirement of exhaustion of domestic remedies, the Committee notes that the High Court of Justice in Murcia had not ruled on the application for reconsideration when the author submitted his communication to the Human Rights Committee on 12 July 1999. However, taking into account the subsequent decision by the High Court of Justice to dismiss the application for reconsideration and noting that the State party has not objected thereto, the Committee considers that domestic remedies have been exhausted.

5.4 Bearing in mind that the High Court of Justice in Murcia reviewed its decision on the claims contained in the communication and the author's failure to demonstrate that the said Court violated his rights under article 12, paragraph 1, of the Covenant, or that he has been denied justice, the Committee considers that the said claims have not been duly substantiated for the purposes of admissibility.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author's counsel.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian, as part of the present report.]

Note

[1] It should be noted that the author had by that time already submitted such an application, on 30 October 1996.

K. Communication No. 935/2000, Mahmoud v. Slovakia (Decision adopted on 23 July 2001, seventy-second session)*

Submitted by:	Mr. Ibrahim Mahmoud (represented by counsel, Mr. Bohumír Bláha)
Alleged victim:	The author
State party:	Slovakia
Date of communication:	2 May 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 2001,

Adopts the following:

Decision on admissibility

1. The author of the communication is Ibrahim Mahmoud, a Syrian national, currently being held in a detention centre in the Slovak Republic. He claims to be a victim of a violation by the Slovak Republic of articles 2, 14, and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 On 17 February 1992, Ibrahim Mahmoud arrived in the Slovak Republic for the purpose of studying at the Pharmaceutical Faculty of Comenius University in Bratislava. He was granted a scholarship by the Ministry of Education and a residence permit for the duration of his stay.

2.2 On 10 March 1998, the author gave up his studies because of ill health. The author refers to two different sets of proceedings, the conduct of which he claims violated his rights under the Covenant. The first relates to the decision to annul his residence permit and requesting him to leave the Slovak Republic and the second relates to the refusal to grant him refugee status.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

Residence permit

2.3 On 16 March 1998, the Border and Alien Police Department of the Bratislav Regional Headquarters, issued a decision, annulling the author's residence permit. The author was not served with this decision. It was delivered by means of a public decree only and as he was unaware of the decision, the author was not able to challenge it by filing an appeal.

2.4 On 29 April 1998, the Border and Alien Police Department of the Regional Police Corps Headquarters, issued another decision, prohibiting the author from re-entering the Slovak Republic before 29 April 2001 and ordering him to leave the Slovak Republic by 15 May 1998. The author's appeal of this decision to the Ministry of the Interior, Police Corps Presidium, Border and Alien Police Department was dismissed.

2.5 The author filed a motion with the Supreme Court requesting it to examine the lawfulness of the decision of the Ministry of the Interior. The Supreme Court considered the case in closed session and informed the author and his lawyer that its judgement would be delivered on 28 January 1999. The author and his lawyer were unable to attend delivery of the judgement as when they arrived the court was being evacuated because of a bomb scare. The author disputes the statement in the text of the Supreme Court judgement that the judgement itself was delivered publicly. The author was served with the written judgement of the Supreme Court on 17 March 1999.

2.6 The author lodged a petition with the Constitutional Court of the Slovak Republic requesting the Court to decide on the constitutionality of the Supreme Court's failure to publicly deliver the judgement. It appears that this was the only ground invoked by the author in his appeal to the Constitutional Court.

2.7 On 27 October 1999, the Constitutional Court determined that the procedure used by the Supreme Court did not violate the rights of the author as the judgement was delivered publicly. This decision was served on the author's lawyer on 5 November 1999.

Asylum procedure

2.8 On 16 May 1998, (the day after the author was supposed to have left the Slovak Republic) he applied for refugee status to the Migration Office of the Interior Ministry of the Slovak Republic. His application was dismissed by a decision dated 8 February 1999, as the author failed to prove that there was a well-founded fear of persecution because of his race, religion, nationality, membership in a particular social group, or political opinion if he were to be returned to his country of origin. In addition, it doubted the credibility of the reasons for which the author was seeking refugee status.

2.9 The author appealed this decision to the Minister of the Interior who examined the case on the basis of written documentation only. The appeal was dismissed by a decision dated 25 May 1999.

2.10 The author then filed a complaint with the Supreme Court to review the legality of the decision. The author was present for the "hearing" of the case on 8 September 1999 but was not accompanied by counsel. The judge asked the author if he wished "to express his opinion on the complaint". The author requested an interpreter but was refused on the basis that "facts were not to be proven" in this instance and therefore the request for an interpreter was unnecessary. The Supreme Court dismissed the complaint and the delivery of the decision was made in Slovak. The author was served with this decision on 8 October 1999. The author claims to have exhausted all domestic remedies in respect of the asylum procedure.

2.11 On March 2000, proceedings were initiated to deport the author from the Republic of Slovakia. No further information has been provided as to the status of these proceedings.

The complaint

3.1 In relation to the decision by the Border and Alien Police Department to annul the author's residence permit, the author states that when the authorities became aware that his whereabouts were unknown he should have been appointed a guardian, under section 16, paragraph 2 of the Administrative Procedure Act No. 71/1967 Coll. If he had been appointed a guardian, the author argues that he would have been in a position to challenge this decision.

3.2 The author claims that the State party violated his right to a public delivery of the Supreme Court judgement and the right to be present during such a delivery under articles 2, 14, paragraph 1, and 26 of the Covenant. As formulated by the author, his complaint only relates to the delivery of the Supreme Court judgement and not to the decision prohibiting him from re-entering the Slovak Republic and ordering him to leave.

3.3 The author claims that he did not receive a fair "hearing" in the Supreme Court as he was refused an interpreter. This decision violated his right to have this "trial" conducted in a language he understands, his right to equal legal protection without discrimination and the principle of equality of arms according to articles 2, article 14, paragraph 1 and article 26 of the Covenant. In addition, he complains that the appeal to the Minister of the Interior is based on documentation only and does not provide the complainant with an opportunity to make oral representations. Finally, he states that the State party incorrectly evaluated the facts and evidence of his case.

Observations by the State party on admissibility

4.1 On the facts of the case the State party states that Ibrahim Mahmoud was expelled from Cormenius University and as the purpose for his residence permit ceased to exist he was requested to leave the Slovak Republic by 15 May 1998. In addition, the State party adds that he was carrying out an unauthorized activity within the terms of his permit by operating a travel agency from 4 December 1997.

4.2 With respect to the author's complaint that the Supreme Court did not deliver its judgement publicly, the State party contends that both the Supreme Court and Constitutional Court based their findings on written evidence submitted by the Ministry of Justice which confirmed that, although the building was evacuated because of a bomb scare, it did remain in session for part of the morning. In addition, the State party states that the delivery of the judgement in this case was recorded in the court files. In the State party's view, it is not the court's role to ensure that the parties to court proceedings are present when judgements are announced and their absence in court at the time of delivery does not constitute a reason for not delivering it. The fact that the author could not enter the building because of the bomb scare cannot be considered a violation of his rights.

4.3 On the issue of the asylum proceedings, according to the State party, the Minister of the Interior dismissed the appeal on the grounds inter alia that, the author had acted "at variance with valid laws" of the Slovak Republic on a number of occasions and, he failed to justify his fear of persecution if returned to his country of origin. In addition, the Minister formed the belief that the author intended to secure his residence in the Slovak Republic to continue his business activities.

4.4 With respect to the author's allegation that he did not receive an interpreter during the Supreme Court proceedings, the State party argues that on this date the Supreme Court only announced its judgement and that no oral evidence was heard. Consequently, the court took the view that an interpreter was unnecessary. Court rulings are always delivered in the official language without translation into the mother tongue of a party to the proceedings. In addition, the State party argues, that the author himself did not avail himself of an interpreter during the first instance of the proceedings because, as he is alleged to have stated in the interview, he has a good command of Slovak. The State party also highlights the fact that Ibrahim Mahmoud has resided in the Slovak Republic since 1992 and did not apply for asylum until 1998.

4.5 In any event, the State party contends that the author has not exhausted domestic remedies in either set of proceedings and requests the Committee to declare the case inadmissible. Firstly, under section 243 (e) and (f) of the Code of Civil Procedure the author had the option of making an extraordinary appeal to the "Prosecutor General", if he believed that a valid ruling of a court violated the law. Under this procedure, the State party explains that if the Prosecutor General finds that the law has been violated he (the Prosecutor General) may lodge an extraordinary appeal with the Supreme Court. In the author's case, a different panel of the Supreme Court, to the one that examined his case in the third instance, would have examined such an extraordinary appeal. If the Supreme Court finds that the law has been violated, it may dismiss the ruling of the judgement in question and return the case to the court that made the incorrect ruling for a further hearing. The State party adds that the submission of a complaint to the Prosecutor General under this extraordinary appeals procedure is not a bar to initiating proceedings at the Constitutional Court.

4.6 Secondly, and with respect to the author's claim for refugee status, the State party argues that the author could have initiated proceedings in the Constitutional Court in accordance with article 130 (3) of the Constitution. The State party explains that such proceedings may be initiated against Court decisions as well as administrative decisions like the decision to refuse the author refugee status. The right to asylum (article 53 of the Constitution) and to proceed before the court in one's mother tongue is protected under the Constitution.

4.7 According to the State party, if the Constitutional Court decides for the author it states in its judgement which constitutional right/s have been violated and through which action, proceedings, or decision of a state authority this violation occurred.

Counsel's comments on admissibility

5.1 The author contests the State party's contention that the Supreme Court merely delivered a judgement on the asylum proceedings and reiterates his view that this was a hearing in which both participants took part. He confirms that he had not requested interpretation facilities at the first instance hearing as he states that his knowledge of Slovak was sufficient to express himself on personal but not legal issues.

5.2 With respect to the author's failure to make an extraordinary appeal to the Prosecutor General, the author states that as the initiation of such proceedings depends exclusively on the Prosecutor and not on the author alone, this remedy is neither available nor accessible to the author.[1]

5.3 On the issue of non-exhaustion of domestic remedies by the author's failure to initiate proceedings in the Constitutional Court, the author argues that such a remedy would have been ineffective. He states that the Constitutional Court cannot investigate valid decisions of judicial bodies, even if they violate human rights, as this would mean the infringement of the independence of judicial bodies guaranteed by the Constitution.[2] Nor can the Constitutional Court prevent the continuation of an unlawful decision by a court or State administrative body. A decision of the Constitutional Court in favour of the complainant can only be used as a "new legal fact" in a case and may eventually lead to new proceedings but it does not represent an effective remedy against the violation of human rights. In addition, even if all the legal requirements have been met, the Constitutional Court is not obliged to consider a case.

Issues and proceedings before the Committee

6.1 Before considering any claims in the communication, the Human Rights Committee must, according to article 87 of the rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 On the issue of the decision by the Border and Aliens Police to annul his residence permit and the author's complaint that he was never informed of this decision, the Committee is of the view that this decision was superseded by the decision of 29 April 1998, ordering the author to leave the Slovak Republic, and therefore finds that it is unnecessary to consider it further.

6.3 With respect to the author's complaint regarding delivery of the Supreme Court's judgement on the refusal to grant him a residence permit, the Committee notes that the author is not contesting the procedure of the actual hearing of his appeal, in which he was represented by counsel. He argues, instead, that because the court building was cleared due to the bomb scare, the delivery of the judgement was not public, and that his rights were violated as he was prevented from being present when the formal judgement was delivered. In this connection, however, the Committee notes that the author concedes that at the time the judgement was delivered, the hearing of his appeal had already been completed and that the judgement was subsequently served on him personally. In these circumstances, the author has failed for the purposes of admissibility to show that his rights under articles 14 and 26 of the Covenant were violated. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 In relation to the proceedings on the author's asylum application, the Committee notes the State party's contention that the author has not exhausted domestic remedies as he did not initiate proceedings in the Constitutional Court, and that the rights allegedly violated by the State party may be invoked in such proceedings. While the author has argued that the Constitutional Court cannot interfere in judicial decisions, he has conceded that that court could make a decision creating "a new legal fact" which could lead to new proceedings. Furthermore, the author's argument stands in contradiction to the information he provided that his petition, against the decision of the Supreme Court regarding public delivery of its judgement, was dealt with on its merits by the Constitutional Court. Accordingly, the Committee is of the opinion that the author has not refuted the State party's argument that he could have challenged the Court's decision before the Constitutional Court on the grounds that he was denied an interpreter. It is therefore of the opinion that domestic remedies have not been exhausted in this regard and this claim is inadmissible under articles 2, and 5, paragraph 2 (b) of the Optional Protocol.

7. The Committee therefore decides:

(a) That this communication is inadmissible under articles 2, and 5, paragraph 2 (b) of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Counsel refers to the opinion of Daniel Svaby who gave a lecture in Bratislava on the exhaustion of domestic remedies under article 26 of the European Convention on Human Rights. In his lecture, he refers to a case of the European Court of Human Rights, H v. Belgium (No. 8950/80, judgement 16.5 1984, DR No. 37, P.5), in which it was decided that domestic remedies had been exhausted despite the fact that an application could have been made to the Attorney-General as the initiation of such proceedings depended exclusively on the Prosecutor and not on the complainant.

[2] The author refers to the remarks of a Slovakian judge of the Constitutional Court, made during an expert seminar in Bratislava in 1995.

L. Communication No. 947/2000, Hart v. Australia, (Decision adopted on 25 October 2000, seventieth session)*

Submitted by: Mr. Barry Hart

Alleged victim: The author

State party: Australia

Date of communication: 31 January 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2000,

Adopts the following:

Decision on admissibility

1. The author of the communication is Barry Hart, an Australian citizen, born on 20 August 1935. He claims to be a victim of a violation by Australia of articles 2 (1), (2) and (3) (a), 14, 17 (1) and (2), 18 (1), 19 (1) and (2) and 26 of the International Covenant on Civil and Political Rights. The International Covenant on Civil and Political Rights entered into force for the State party on 12 November 1980 and the Optional Protocol entered into force on 25 December 1991.

The facts as presented

2.1 In 1973, the author voluntarily attended Chelmsford private hospital for a psychiatric appointment with a Dr Herron, a leading doctor in deep-sleep treatment at Chelmsford. The author contends that he was involuntarily rendered unconscious by staff at Chelmsford. Over the following 10 days, the author alleges that he was treated with large and potentially toxic quantities of nasally-administered drugs (including barbiturates) without his consent. Electro-convulsive therapy was also administered to the author without relaxants. The author suffered double pneumonia, pleurisy, deep vein thrombosis, pulmonary embolis and anoxic brain damage as a result of these treatments. On 20 March 1973, the author was transferred to Hornsby Public Hospital with bilateral pneumonia and pulmonary embolus, before being discharged on 3 April 1973. Following discharge, the author suffered convulsions, sensitivity to noise, heightened startle response, nightmares, dry retching and continual psychological arousal. This was diagnosed as severe, chronic post traumatic stress disorder. These effects are stated to have rendered the author virtually unemployable, with the result that he now lives on a disability pension. Over the years, the author contends that this symptom has become exacerbated to the point now of being untreatable.

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* The following members of the Committee participated in the examination of the communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Under rule 85 of the Committee's rules of procedure, Ms. Elizabeth Evatt did not participate in the examination of the case.

2.2 The author commenced legal proceedings by statement of claim in the District Court of New South Wales in November 1976. These proceedings were transferred to the Supreme Court of New South Wales in 1979.

2.3 In March 1980, civil proceedings against Chelmsford and Dr Herron before Judge Fisher and a jury began in the Supreme Court of New South Wales. The author contends that the hearing was unfair in a variety of respects. The judge is said to have excluded important probative evidence as prejudicial, and inappropriate pressure was placed on the jury to reach a quick verdict. The defendants adduced no medical witnesses in support of their position, but the judge directed the jury on the medical evidence unfavourably to the plaintiff. The author states that post-traumatic stress disorder from which he was suffering was not a recognized illness at that time. Exemplary (punitive) damages were withdrawn from the jury by the trial judge on the basis that there was no evidence of gross and callous malpractice and neglect which could warrant them. On 14 July 1980, the jury returned verdicts against Chelmsford for false imprisonment and Dr Heron for false imprisonment, assault and battery and negligence. The author was awarded damages of $6,000 for false imprisonment against both defendants, $18,000 for assault and battery against Dr Herron and $36,000 compensatory damages (for past and future loss of earnings) against both defendants. In August 1980, the defendants appealed the "excessive" damages, while the author also cross-appealed on quantum and the withdrawal of exemplary damages.

2.4 In 1983, the author complained to the Investigating Committee of the Medical Board about his treatment at Chelmsford and related issues arising out of the 1980 trial.

2.5 In March 1986, the Investigating Committee found a prima facie case of professional misconduct against Dr Herron warranting reference to a Disciplinary Tribunal. Dr Herron pursued a claim of abuse of process in the New South Wales Court of Appeal, which referred the matter to the Disciplinary Tribunal. In June 1986, Judge Ward of the Tribunal held that there had been no delay by the author so as to constitute an abuse of process, citing the variety of legal action during that period.

2.6 In September 1986, on application by Dr Herron the New South Wales Court of Appeal (McHugh CJ, Priestley and Street JJA) permanently stayed the disciplinary proceedings, without reference to Judge Ward's judgement, on the basis that the author had abused the process by delaying a complaint to the investigating committee of the medical board for three years. The High Court of Australia, in December 1986, refused special leave by the author to appeal the Court of Appeal's judgement.

2.7 In August 1988, a Royal Commission of Inquiry was commissioned to investigate into practices at Chelmsford, including the deep sleep therapy practised and the large number of deaths that had occurred there. The Royal Commission examined the author's case, among others, in detail. In a very critical report of December 1990, the Commission considered that criminal conduct had occurred and that there was evidence of serious psychological damage. It found the defendants had conspired to pervert the course of justice, including by threatening an eye-witness nurse, and had forged the author's supposed consent to treatment, followed by deliberately lying about the incident of forgery.

2.8 In 1993, the author states that he was diagnosed with debilitating psychiatric illness for the first time. In June 1993, the New South Wales Court of Appeal dismissed Dr Herron's application that the author's appeal from the 1980 trial be dismissed for want of prosecution.

2.9 In August 1995, the author's appeal from the 1980 trial was heard in the New South Wales Court of Appeal, with the author appealing against an inadequate quantum of compensatory damages and the withdrawal of exemplary damages from the jury by the trial judge. Dr Herron's cross-appeal was not pursued. On 6 June 1996, the New South Wales Court of Appeal (Priestley, Clarke and Sheller JJA) dismissed the appeal, with costs against the author. The Court found, inter alia, that reports of psychological testing done in 1972 showed "many of the symptoms" subsequently attributed to the Chelmsford treatment. The Court considered that the Royal Commission of Inquiry's findings, combined with other evidence, only went so far as to support a conclusion that Dr Herron had "acted badly" in concert with others. Priestley JA, writing for the Court, found that "It does not seem to me that the further material relied on by the appellant could have taken the matter any further than the materials actually available at the trial." The Court held it could find no error in the trial judge's conduct.

2.10 In April 1997, an application to the High Court of Australia for special leave to appeal was denied (Brennan, Dawson and Toohey JJ), again with costs against the author. The Court held the author could not pursue exemplary damages so long after trial. The author states that the criminal activity concerned was only exposed at the Commission in 1990 and that he had been engaged in protracted legal proceedings since that point.

The complaint

3. The author complains that the State failed to properly regulate the standards and practices at Chelmsford and to investigate a series of complaints from nursing staff and State inspectors. The author also complains that the judiciary and the legal profession was biased against him and stigmatized him on the basis of his psychiatric treatment, in particular in the 1980 civil trial against Dr Herron. Moreover, the author alleges that the New South Wales Court of Appeal is said to have ignored relevant evidence, fabricated facts and evidence and handed down false and misleading judgements in both the staying of disciplinary proceedings in 1986 and the substantive appeal in 1996. The author states that the State party has failed to provide and exercise appropriate regulatory and investigatory mechanisms over the judiciary and the legal profession. The courts also have failed to award fair and adequate compensation to him as a victim of stated psychiatric abuse and torture. The author claims that the above constitute violations of articles 2, 14, 17, 18, 19 and 26 of the ICCPR.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 As the Optional Protocol entered into force for Australia on 25 December 1991, the Committee is precluded ratione temporis from considering allegations that relate to events that occurred before this date, unless they had continuing effects that in themselves constitute a violation of the Covenant. Thus the author's complaints regarding his treatment at Chelmsford, the civil trial against Dr Herron and the decision of the New South Wales Court of Appeal staying the disciplinary proceedings against Dr Herron, which all occurred before 25 December 1991, must be considered inadmissible.

4.3 As regards the author's complaints relating to the decisions of the New South Wales Court of Appeal and the High Court of Australia, the Committee recalls that it is generally not for the Committee but for the courts of States parties to evaluate the facts and evidence in a specific case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. Furthermore, it is not for the Committee to review the interpretation of domestic law by the national courts. In the present case, the Committee notes that both the New South Wales Court of Appeal and the High Court of Australia considered the author's allegations and, on the basis of the available evidence, refused to disturb the lower court's findings of facts and law. The author's allegations and the information before the Committee do not substantiate that the Court of Appeal or the High Court's decisions were manifestly arbitrary or amounted to a denial of justice. In the circumstances, this part of the communication is inadmissible under article 2 of the Optional Protocol.

4.4 With regard to the author's remaining allegations, the Committee considers that the author has failed to substantiate them, for purposes of admissibility. They are therefore also inadmissible under article 2 of the Optional Protocol.

5. The Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

M. Communication No. 948/2000, Devgan v. Canada, (Decision adopted on 30 October 2000, seventieth session)*

Submitted by: Mr. Ravi Devgan (represented by Mr. Harry Kopyto, legal agent)

Alleged victim: The author

State party: Canada

Date of communication: 1 June 2000

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 2000,

Adopts the following:

Decision on admissibility

1. The author of the communication is Ravi Devgan, a Canadian citizen, born in 1946. He claims to be victim of the violation of his rights under articles 2, 3, 7 and 14 of the International Covenant for Civil and Political Rights by Canada.

Facts as submitted by the author

2.1 On 26 January 1996, the Ontario Court tried the author on one account of fraud and one account of making a false statement, involving separate complainants. The author pleaded not guilty, but was found guilty, and on 17 May 1996 he was sentenced to 90 days of intermittent imprisonment. The author claims that although a civil suit for compensation for the fraud had been settled, he was also ordered to pay compensation to both complainants, under section 725 (1) of the Criminal Code.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski. Pursuant to rule 85 of the Committee's rules of procedure, member Maxwell Yalden did not participate in the consideration of the communication.

2.2 The author, represented by a solicitor, gave Notice of Appeal of both conviction and sentence set by the Ontario Court. However, the solicitor advised the author that if he proceeded with the appeal a higher sentence might be imposed. In August 1999, the author confirmed in writing to his counsel the withdrawal of his Notice of Appeal. Counsel submitted a Notice of Abandonment to the court, which dismissed the appeal as abandoned on 11 August 1999. The author also appealed the compensation orders. In a judgement of 26 May, 1999 the Ontario Court of Appeal set aside one compensation order and reduced the other.

2.3 After withdrawing his appeal against the conviction and sentence the author obtained new advice, which indicated that it would be extraordinary for the Court of Appeal to increase the sentence, given that no cross-appeal was taken by the Crown in respect of the sentence. The author then submitted a motion to set aside the order of abandonment of the appeal. The Court of Appeal for Ontario dismissed the motion on 7 February 2000, holding that there was no basis to set aside the abandonment. The author applied for leave to appeal this decision to the Supreme Court of Canada, which on 23 March 2000 refused the application. Furthermore, the author applied for leave to appeal the Ontario Court of Appeal's judgement in respect of the compensation. The Supreme Court of Canada refused the application on 20 April 2000.

The complaint

3. The author contends that by denying him his right to appeal, the courts violated his rights pursuant to articles 2, 3, 7 and 14 of the Covenant. He also claims that the courts placed him in double jeopardy by giving a compensation order at the criminal trial, after a civil action had settled the matter, and that this also constitutes a violation of articles 7 and 14.

Issues and proceedings before the Human Rights Committee

4.1 Before considering any claims contained in the communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 With regard to the author's claim that he was denied the right to appeal, the Committee notes that according to the information provided by the author, he initially exercised his right to appeal, but subsequently withdrew the appeal. Nothing in the author's allegations or in the information before the Committee substantiates for purposes of admissibility, the author's claim that in refusing his motion for reopening the appeal the State party violated articles 2, 3, 7 or 14 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.3 As regards the compensation awarded in the criminal trial, the Committee is of the view that the author has failed to substantiate his claim that in awarding compensation the State party violated his rights under articles 7 and 14 of the Covenant. This part of the communication is also therefore inadmissible under article 2 of the Optional Protocol.

5. The Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

N. Communication No. 949/2000, Keshavjee v. Canada (Decision adopted on 2 November 2000, seventieth session)*

Submitted by:	Mr. Ameer Keshavjee
Alleged victim:	The author
State party:	Canada
Date of communication:	4 June 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 November 2000

Adopts the following:

Decision on admissibility

1. The author of the communication is Ameer Keshavjee, a Canadian national, born 4 October 1938. He claims to be a victim of a violation by Canada of articles 14, 25 (c) and 26 of the International Covenant on Civil and Political Rights.

The facts as presented

2.1 The author was employed by Revenue Canada from 19 September 1989 as a Collection Contact Officer after successfully passing the relevant examinations. The appointment was probationary to 9 April 1990. On 15 March 1990, the author passed a further examination and was offered an appointment as Collection Enforcement Officer to commence 9 April 1990 for a 12 month probationary period. On 31 July 1990 the author received written advice from the Collection Group Supervisor that five test checks of the author's work between November 1989 and July 1990 had shown unsatisfactory performance. These tests were conducted on 8 November 1989, 10 January 1990, 5 March 1990, 22 June 1990 and 10 July 1990.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski. Under rule 85 of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in the examination of the case.

2.2 On 31 July 1990, the author was given 90 days to correct these deficiencies or have the probationary appointment terminated. He was also advised that three test checks would be performed during that 90 day period. He contends that this was the first notice he had received that his performance was less than acceptable. He also alleges that the whole Unit's production had been down but no other employee had received such a letter. On 29 August 1990, the author was advised that, due to unsatisfactory performance, the usually payable pay increment commencing 19 September 1990 would be denied. This withholding appears to be a standard procedure in cases where management determines that an employee is not performing at an acceptable level. On 28 November 1990, the author's probationary appointment was terminated.

2.3 With the assistance and advice of the Union of Tax Employees, the author challenged the failure to provide the pay increment and the termination of appointment through four levels of internal complaint procedures (details unspecified). That process concluded on 22 January 1992 with advice of the final level hearing. The pay increment was restored at the third level hearing, but the termination was not reversed at any point.

2.4 In October 1991, the author complained to the Canadian Human Rights Commission alleging that he was discriminated against on the basis of his race, colour and national or ethnic origin (East Indian) in the termination of his employment. The Commission, after full investigation, found that the author's performance had not improved as advised, and that other collection officers were treated in the same way as the author. It concluded in August 1992 that the complaint was unfounded. The author made a further approach to the Commission to review its decision, which was also denied.

2.5 In November 1992, the author complained to the Public Service Commission of Canada in respect of his case. That complaint was dismissed in December 1992. The author has made a variety of further attempts to secure redress through the Prime Minister, the Minister of National Revenue and Members of Parliament. He has not proceeded with any further Court action, for instance in the Federal Court of Canada. He contends that such recourse would be pointless, as the Federal Court's review of decisions of the Human Rights Commission is confined to matters of jurisdiction and procedural fairness.

The complaint

3.1 The author raises two main complaints. The first complaint is against the Union of Taxation Employees, representing the author in the internal grievance proceedings. He alleges that the union failed to explain the proper appeal procedures applicable to his case, and that the union had against his wishes excluded him from certain hearings. He also alleges that members of the Union arranged for his dismissal.

3.2 The essence of the author's main complaint relates to his allegation of discrimination in the termination of his employment. The author claims that he had recently passed higher level examinations and points out that the pay increment initially denied was later awarded. He charges that his dismissal was based upon racial discrimination. To support this claim he argues that his supervisors, the union officials representing him and the adjudicators were Caucasian and that the internal grievance procedures were unfair, as persons who had exercised management functions were also members of grievance panels. The author contends that the above constitutes violations of article 14, 25, paragraph (c), and 26 of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 In terms of the allegations directed against the conduct of the Union, the Committee observes that the allegations are directed against private parties. In the absence of any argument on which the State party might be held responsible for the actions of these individuals, this part of the communication is inadmissible ratione personae under article 1 of the Optional Protocol.

4.3 In terms of the author's allegations of discrimination, the Committee recalls that, according to its constant jurisprudence, it is not for the Committee, but for the competent authorities of the State party to evaluate facts and evidence. The Committee does not interfere in such an evaluation unless it was manifestly arbitrary or amounted to a denial of justice. In the instant case, the Committee notes that the author's allegations were examined on their merits by the Canadian Human Rights Commission, which found that the author's employment had been terminated not on any discriminatory ground, but for failure to improve unsatisfactory performance. Moreover, it found that other tax collection officials had been treated in the same manner. The author has failed to substantiate, for the purposes of admissibility, that these findings were either manifestly arbitrary or amounted to a denial of justice. In the light of this finding of the Human Rights Commission, the Committee is of the view that the author has failed to substantiate, for the purposes of admissibility, that his dismissal involved violations of his rights under articles 14, 25, paragraph (c), and 26 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

5. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

O. Communication No. 952/2000, Parun and Bulmer v. New Zealand (Decision adopted on 22 March 2001, seventy-first session)*

Submitted by: Messrs. M. J. Parun and K. D. Bulmer

Alleged victim: The authors

State party: New Zealand

Date of communication: 15 October 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 2001

Adopts the following:

Decision on admissibility

1. The authors of the communication are Kenneth Daniel Bulmer, born in 1964, and Melvin Joseph Parun, born in 1955, both New Zealand citizens. They claim to be victims of the violation of their rights under articles 2, 14 and 26 of the International Covenant on Civil and Political Rights by New Zealand.

Facts as submitted by the authors

2.1 The authors were barristers practising in New Zealand, working with criminal cases, including legal aid cases.

2.2 It appears that the authors commenced procedures in the High Court at Wellington, New Zealand, on 4 August 1997, alleging that the Registrar of the Wellington District Court allocated criminal legal aid to lawyers in an unreasonable and unlawful way. The authors provide no information on these proceedings.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.3 In April 1998, the authors applied to the Court of Appeal for a disqualification from the hearing of their case of High Court Justice Neazor, on the grounds of the judge's alleged involvement in policy and administration of legal aid. In a letter dated 10 July 1998, directed to the Registrar of the Court of Appeal of New Zealand, authors' counsel objected to the involvement in the court hearing by several listed Court of Appeal judges due to their involvement in several committees and councils. They also required declarations from all permanent judges of the Court of Appeal, inter alia, about their involvement in committees listed in the letter, stating that any hearing in breach of either of the said requirements would give rise to claims for substantial damages.

2.4 On 20 July 1998, the Court of Appeal of New Zealand dismissed the application for disqualification of Justice Neazor on the grounds that it had no jurisdiction to act upon an originating application.

2.5 In its judgement, the Court of Appeal stated that it was forwarding the judgement and the authors' letter to the Registrar of the Court to the Wellington District Law Society (WDLS). The Court was of the opinion that the authors had misused the Court's procedure, that their letter to the Registrar could be interpreted as a threat to the judges, and lodged a complaint to the WDLS against the authors accordingly. In a letter dated 11 November 1998, the WDLS found the complaint justified. According to the authors, the WDLS decision may be appealed to the High Court of New Zealand.

2.6 On 21 September 1998, the Court of Appeal of New Zealand dismissed the authors' application for conditional leave to appeal the 20 July 1998 decision to the Privy Council, on the basis that the court had no jurisdiction to grant the leave. On the same day, the Court of Appeal of New Zealand dismissed the authors' ancillary application for discovery in their case against Justice Neazor, on the basis that the authors did not appear before the Court. The authors state that they may appeal the decisions to the Privy Council directly. However, they choose not to submit a direct appeal to the Privy Council since the members of the Court of Appeal are also members of the Privy Council, and the authors consider them all biased against them.

2.7 The authors further claim that they have not pursued available court remedies in respect of their claim to be registered as legal aid lawyers, their eventual complaint against the WDLS decision and their eventual claim for compensation from the State, because the New Zealand courts are biased against them.

The complaint

3. The authors contend that by failing to provide them with an effective remedy of disqualifying the High Court Justice Neazor, and by allowing participation of several judges in the Court of Appeal whom the authors had alleged were biased against them, their rights pursuant to articles 2, 14 and 26 of the Covenant were violated. Furthermore, the authors claim violation of the Covenant because they were being denied access to an independent and impartial court in respect of their claim to be registered as legal aid lawyers, their eventual complaint against the WDLS decision and in respect of their eventual claim for compensation from the State.

Issues and proceedings before the Human Rights Committee

4.1 Before considering any claims contained in the communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The essence of the authors' claim is that all New Zealand courts are biased against them. For this reason they fail to pursue remedies before the domestic courts. The Committee is of the opinion that the authors have provided no substantiation for this claim. In these circumstances, the Committee is of the view that the authors' claim has not been substantiated for purposes of admissibility, and the communication is therefore inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

5. The Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the authors and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

P. Communication No. 963/2001, Uebergang v. Australia (Decision adopted on 22 March 2001, seventy-first session)*

Submitted by: Mr. Colin Uebergang

Alleged victim: The author

State party: Australia

Date of communication: 29 June 2000 (initial presentation)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 2001

Adopts the following:

Decision on admissibility

1. The author of the communication is Colin Uebergang, an Australian citizen, currently residing in Brisbane in the State of Queensland, Australia. He claims to be a victim of violations by Australia of articles 9, paragraph 5 and 14, paragraph 6, of the International Covenant on Civil and Political Rights. The author is represented by counsel. The State party ratified the Covenant on 13 October 1966 and the Optional Protocol on 25 December 1991.

The facts as submitted on behalf of the author

2.1 Between 8 September and 11 September 1997, the author was tried on indictment on three counts of false pretences in the District Court at Brisbane and was found guilty on one count and discharged in respect of the other two counts. On 11 September 1997, he was sentenced to a term of two years imprisonment.

2.2 The author appealed his conviction to the Queensland Court of Appeal. On 27 February 1998, the Court of Appeal unanimously allowed his appeal, set his conviction aside and entered a verdict of acquittal. Mr. Uebergang was released from prison later that day.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfic Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.3 The author wrote to the Queensland Attorney-General, on 10 February 1999 and 20 May 1999, seeking compensation for a miscarriage of justice occasioned by his allegedly wrongful imprisonment for five and a half months (from his conviction in the trial court until acceptance of his appeal). On 17 February, the advisor to the Office of the Attorney-General informed Mr. Uebergang that the Attorney-General refused to pay compensation to the victim as no exceptional circumstances which might justify the making of an ex gratia payment of compensation ... have been identified. The author's counsel wrote to the Attorney-General on 5 June 2000 and received the same negative response. In requesting compensation from the Attorney-General, the author claims that he has exhausted all domestic remedies within the meaning of article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

The complaint

3.1 Counsel states that the refusal of the State of Queensland to compensate Mr. Uebergang for this period of wrongful imprisonment constitutes a breach by Australia of articles 9, paragraph 5 and 14, paragraph 6, of the Covenant.

3.2 Counsel argues that the refusal of the Attorney-General's office to grant compensation because there were no exceptional circumstances, is a violation of article 14, paragraph 6, as this criterion is not included in the terms of this article of the Covenant.

3.3 Counsel contends that the elements of article 14, paragraph 6, are as follows: that there is a final decision; that the complainant is convicted of a criminal offence; that the conviction is subsequently reversed or that the person is pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice; and it has not been proved that the non-disclosure of the unknown fact in issue is wholly or partly attributable to the complainant.

3.4 Counsel submits that all elements of article 14, paragraph 6, have been satisfied. He contests the Attorney-General's argument that this article only applies to cases where the convicted person has unsuccessfully exercised all their appeal rights, with the result that the final decision of the courts is that their conviction is affirmed. Counsel argues that such a view would mandate the limitation of the application of the Covenant only to those cases where a pardon had been granted and believes that the terms of this article are expressly intended to apply to cases of reversal of conviction, as well as cases of pardon.

3.5 Counsel makes no submissions with regard to a violation of article 9, paragraph 5, except to say that this article was violated.

Decision on inadmissibility

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 With regard to the author's claim for compensation under article 14, paragraph 6, of the Covenant, the Committee observes that the conditions for the application of this article are:

(a) A final decision convicting a person of a criminal offence;

(b) Suffering of punishment as a consequence of such conviction; and

(c) A subsequent reversal or pardon on the ground of a new or newly discovered fact showing conclusively that there has been a miscarriage of justice.

4.3 The Committee observes that the author's conviction by the District Court on 11 September 1997 was overturned by the Court of Appeal on 27 February 1998. The Committee is, therefore, of the view that the author's conviction was not a final decision within the meaning of article 14, paragraph 6 and that article 14, paragraph 6, does not apply to the facts of the instant case. This part of the communication is therefore inadmissible ratione materiae under article 3 of the Optional Protocol.

4.4 With respect to the author's allegation of a violation of article 9, paragraph 5, the Committee notes that after his conviction by the trial court the author was imprisoned on the basis of the sentence passed by that court. His subsequent acquittal by the Court of Appeal does not, per se, imply that his imprisonment on the strength of a court order was unlawful. Counsel has provided no further arguments to substantiate the claim under article 9, paragraph 5. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

5. The Committee, therefore, decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Q. Communication No. 991/2001, Neremberg v. Germany (Decision adopted 27 July 2001, seventy-second session)*

Submitted by:	Ms. Hena Neremberg et al. (represented by counsel, Mr. Edward Kossoy)
Alleged victims:	The authors
State party:	Germany
Date of communication:	30 October 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 2001,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Ms. Hena Neremberg and 10 other individuals currently residing in Canada, France, and Israel respectively. The authors claim to be victims of violations by Germany of article 14 of the International Covenant on Civil and Political Rights. The authors are represented by counsel. The Optional Protocol entered into force for Germany on 25 November 1993. Germany entered reservations *ratione temporis* and concerning article 5, paragraph 2 (a) of the Optional Protocol.

The facts as submitted on behalf of the author

2.1 The authors are heirs and assigns of the property of a tannery in the city of Radom (Poland). Shortly after the German occupation in World War II, the enterprise had been confiscated for being owned by ethnic Jews and, from then on, had been controlled by the administrative authorities established in Poland by the German Reich. During this time, on different occasions, high quantities of leather produced in the tannery had been delivered to Hannover (Germany). Furthermore, other property of the authors' ancestors had been confiscated or seized.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

Under rule 85 of the Committee's rules of procedure, Mr. Eckart Klein did not participate in the examination of the case.

2.2 In November 1958, the authors and/or other relatives claimed compensation for the leather delivered to Hannover and other confiscated or seized property as provided for in the relevant provisions of the Federal Restitution Act ("Bundesrückerstattungsgesetz"). From 1962 on, the case was pending at the district court of Berlin ("Landgericht"). In 1971, the authors agreed on a friendly settlement concerning one part of the claim. With regard to another part of the claim the court procedure continued.

2.3 In separate partial decisions, in 1983 and in 1987, the district court Hannover granted the authors compensation for other confiscated property of the tannery, while the procedure continued. In 1992, some of the authors assigned their claims to a commercial trust company, reserving their right to claim compensation for damage caused by the delay of proceedings. In 1993, after further evidence was established, the district court awarded the authors compensation for other material losses. The appeal against the partial decisions by Germany has been rejected as unsubstantiated in second and third instance. Further appeals against the costs order were dismissed. At that time, the total compensation granted by the court amounted to several million DM.

2.4 In 1995, the authors agreed to a friendly settlement on all outstanding compensation claims against payment of DM 1 million.

2.5 In 1996, the authors claimed, before the district court Hannover, compensation for the length of procedure regarding their compensation claims.

2.6 The court rejected the claim arguing that the Federal Restitution Act does not provide for compensation claims other than those mentioned in this act. In 1998, the appeal of the authors against this decision was rejected finally by the Federal Court ("Bundesgerichtshof").

2.7 The authors then turned to the European Commission of Human Rights with a complaint against the delay in the procedures. In 1998, the European Commission of Human Rights declared the application of the authors inadmissible for lack of exhaustion of remedies available under German law, i.e. the authors neither instituted official liability proceedings ("Amtshaftungsklage") nor lodged a constitutional complaint ("Verfassungsbeschwerde") with the Federal Constitutional Court ("Bundesverfassungsgericht").

Decision on inadmissibility

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee observes that, when ratifying the Optional Protocol and recognizing the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction, the State party made the following reservation, with reference to article 5, paragraph 2 (a) of the Optional Protocol:

> "the competence of the Committee shall not apply to communications

(a) which have already been considered under another procedure of international investigation or settlement"

Moreover, the State party made a reservation ratione temporis excluding the Committee's competence in any case:

> "having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany".

4.3 The Committee notes that the author's claim of undue delay in violation of article 14, paragraph 1 of the Covenant is mainly related to proceedings that were pending prior to 25 November 1993, the entry into force of the Optional Protocol for the State party, and that no part of the claim relates to events that occurred after 1995.

4.4 Moreover, the Committee notes that the authors have not availed themselves of existing redress possibilities, including official liability proceedings ("Amtshaftungsklage") or constitutional complaint ("Verfassungsbeschwerde"). Consequently, their complaint was declared inadmissible by the European Commission of Human Rights due to the non-exhaustion of domestic remedies, an admissibility requirement that appears also in article 5, paragraph 2 (b) of the Optional Protocol.

5. The Committee, therefore, decides:

(a) That the communication is inadmissible under articles 1, 2, 3, 5, paragraph 2 (a) and (b) of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]